DOCKET

No. 84-5240-CFX
Status: GRANTED

Title: Maria Lucie Jean, et al., Petitioners
v.
Alan Nelson, Commissioner, Immigration and Naturalization Service, et al.

Docketed:
August 1, 1984

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Kurzban, Ira J.

Counsel for respondent: Solicitor General, Joaquin, Linton

Entry	Date	Note	Proceedings and Orders
1	Aug 1 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Aug 30 1984		Brief amicus curiae of American Immigration Lawyers filed.
4	Aug 31 1984		Brief amicus curiae of National Assn. for the Advancement of People, et al. filed.
5	Aug 30 1984		Brief amicus curiae of The Procedural Aspects of Internat'l. Law Inst., et al. filed.
7	Sep 11 1984		Order extending time to file response to petition until October 13, 1984.
8	Oct 16 1984		Brief of respondents Nelson, Commr., INS, et al. in opposition filed.
9	Oct 25 1984		DISTRIBUTED. November 9, 1984
10	Oct 29 1984	X	Reply brief of petitioners Maria L. Jean, et al. filed.
12	Nov 13 1984		REDISTRIBUTED. November 21, 1984
14	Nov 26 1984		REDISTRIBUTED. November 30, 1984
16	Dec 3 1984		Petition GRANTED.
			**********
17	Dec 20 1984		Joint appendix filed.
19	Jan 16 1985		Brief of petitioners Maria L. Jean, et al. filed.
20	Jan 17 1985		Brief amicus curiae of Lawyers Comm. for International Human Rights, et al. filed.
21	Jan 17 1985		Brief amicus curiae of NAACP, et al. filed.
22	Jan 17 1985	N	Motion of Aguilar and Lezcano for leave to file a brief as amicus curiae filed.
23	Jan 17 1985		Brief amicus curiae of Procedural Aspects of International Law Institute, et al filed.
24	Jan 17 1985		Brief amicus curiae of Asian American Legal Defense and Educ. Fund, et al. filed.
25	Jan 17 1985		Brief amicus curiae of Amnesty International USA filed.
26	Jan 17 1985		Brief amicus curiae of American Immigration Lawyers Assn. filed.
27	Jan 17 1985		Brief amicus curiae of NAACP Legal Defense Fund filed.
28	Jan 17 1985		Brief amicus curiae of American Civil Liberties Union Fdtn. filed.
29	Jan 17 1985		Brief amicus curiae of Natl. Coalition for Haitian Refugees, et al. filed.
30	Jan 17 1985		Record filed.
31	Jan 17 1985		Brief amicus curiae of Metropolitan Dade Cnty, et al. filed.
32	Feb 5 1985		SET FOR ARGUMENT. Monday, March 25, 1985. (3rd case).
33	Feb 15 1985		Brief amicus curiae of Washington Legal Foundation filed.
34	Feb 15 1985		Brief amicus curiae of Federation for American Immigration

No. 84-5240-CFX

Entry	Date	Note	Proceedings and Orders
			Reform filed.
35	Feb 13 1985		Application of the Solicitor General for leave to file respondents' brief on the merits (A-631) in excess of
36	Feb 13 1985		of the page limitation filed, and order granting same by
37	Feb 13 1985		Powell, J., on Feb. 14, 1985. The brief may not exceed 60 pages.
39	Feb 19 1985		Order extending time to file brief of respondent on the merits until February 22, 1985.
40	Feb 22 1985		Brief of respondents Nelson, Commr., INS, et al. filed.
41	Mar 5 1985		CIRCULATED.
42	Mar 18 1985	X	Reply brief of petitioners Maria L. Jean, et al. filed.
43	Mar 25 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-5240

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CLERK

NO.

in the

Supreme Court

of the

United States

October Term, 1984

MARIE LUCIE JEAN, ET AL.,
Petitioners,

vs.

ALAN NELSON, ET AL.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Counsel:
Bruce J. Winick, Esq.
Irwin P. Stotzky, Esq.
Christopher Keith Hall, Esq.
Michael Rosen, Esq.

Counsel of Record:
Ira J. Kurzban, Esq.
Kurzban, Kurzban & Weinger, P.A.
Suite 901
700 Brickell Avenue
Miami, Florida 33131
Tel: (305) 371-0268

Of Counsel:
Robert E. Juceam, Esq.
Terrence A. Corrigan, Esq.

Attorneys for Petitioners

43pp

QUESTIONS PRESENTED

Is invidious discrimination on the basis of race and nationality by low-level immigration officials, acting pursuant to neutral statutes and directives, in the incarceration of excludable black Haitian refugees in detention camps, wholly beyond constitutional scrutiny?

Whatever judicial deference may be accorded the actions of Congress and the President in exercising their authority to admit or exclude aliens, does such deference wholly preclude constitutional review of the established invidiously discriminatory conduct of low-level government officials in regard to non-admission questions?

Does *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), have continuing validity, and should it be extended to permit invidious discrimination based on race and national origin by Immigration and Naturalization Service enforcement officials in the incarceration of aliens pending determination of their asylum claims?

PARTIES TO THE PROCEEDING

The petitioners are: Marie Lucie Jean, Lucien Louis, Herold Jacques, Jean Louis Servebien, Pierre Silien, Wilner Luberisse, Job Dessin, Joel Cashimir, Serge Verdieu, Milfort Vilgard, and the heirs of Prophete Talleyrand,* on behalf of themselves and all others similarly situated; and The Haitian Refugee Center, Inc., a non-profit membership corporation, on behalf of itself and its members.

The respondents are: Alan C. Nelson, Commissioner, Immigration and Naturalization Service; Perry Rivkind, District Director, Immigration and Naturalization Service, District VI; Leonard Rowland, Assistant District Director for Deportation, Immigration and Naturalization Service, District VI; Franklin Graves, Immigration and Naturalization Service, Officer in Charge, Krome Avenue North Detention Facility; The Immigration and Naturalization Service; and William French Smith, Attorney General of the United States.

*Mr. Tallyrand committed suicide during the pendency of this suit while being held in detention by the Immigration and Naturalization Service.

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OPINIONS BELOW

On May 4, 1984, the United States Court of Appeals for the Eleventh Circuit denied petitioners' request for a rehearing of its *en banc* decision (App. 158) and for a stay pending petition for a writ of certiorari (App. 157), and entered its final judgment on rehearing *en banc* (App. 156). None of these decisions are reported. The *en banc* court's opinion is reported. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (App. 1). The panel opinion is reported. *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983) (App. 35). The decision of the court of appeals denying the respondents' request for a stay is also reported. *Jean v. Nelson*, 683 F.2d 1311 (11th Cir. 1982) (App. 91).

The district court's final judgment is reported, *Louis v. Nelson*, 544 F.Supp. 1004 (S.D. Fla. 1982) (App. 125), as is its opinion. *Louis v. Nelson*, 544 F.Supp. 973 (S.D. Fla. 1982) (App. 93). Other earlier opinions of the district court are also reported, including its decision dismissing several claims before trial on jurisdictional grounds, *Louis v. Meissner*, 532 F.Supp. 881 (S.D. Fla. 1982) (App. 131), its decision enjoining exclusion hearings against unrepresented incarcerated class members, *Louis v. Meissner*, 530 F.Supp. 924 (S.D. Fla. 1981) (App. 144) and its decision permitting petitioners' amended petition and complaint. *Jean v. Meissner*, 90 F.R.D. 658 (S.D. Fla. 1981) (App. 151).

JURISDICTIONAL STATEMENT

This petition seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit *en banc* entered on February 28, 1984 (App. 1). On May 4, 1984, that court denied petitioners' request for rehearing

en banc (App. 158) and entered its judgment (App. 156). Petitioners then filed this timely petition for certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims are based on the equal protection guarantee of the due process clause of the fifth amendment to the United States Constitution and 8 U.S.C. §1182(d)(5)(A)(1982). These provisions are set forth below:

U.S. Const., amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. §1182(d)(5)(A)(1982):

> The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

STATEMENT OF THE CASE

This petition challenges the decision of the Eleventh Circuit *en banc* which held, despite overwhelming and unrebutted factual findings establishing a stark pattern of invidious discrimination in the incarceration of Haitian refugees,[1] that such discriminatory acts by low-level immigration officials are wholly beyond constitutional scrutiny. The petition does not challenge the authority of the Immigration and Naturalization Service (hereinafter cited as "INS") to admit or to exclude aliens. Indeed, it does not even challenge the authority of the INS to

[1]The detailed factual findings of invidious discrimination made by a panel of the Eleventh Circuit, *Jean v. Nelson*, 711 F.2d 1455, 1483-1502 (11th Cir. 1983), were undisturbed by the *en banc* court. *Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984).

maintain a policy of detaining excludable aliens on a non-discriminatory basis. It challenges only the authority of low-level enforcement officials to discriminate invidiously in decisions concerning the incarceration of excludable aliens pending a determination of their claims to asylum. As the record in this case demonstrates, without contradiction, INS officials have discriminated invidiously against black Haitian aliens in deciding to incarcerate them initially and in prolonging their incarceration without parole pending determination of their asylum claims.

This case began as a result of the actions of INS officials during the week of June 1-5, 1981, in holding mass exclusion "hearings" for Haitian refugees seeking asylum in the United States. The respondents held these hearings behind locked courtroom doors and intentionally barred *pro bono* counsel seeking access to the Haitians. Haitians brought to the INS courtroom from the detention center were deliberately routed through back stairwells and immmigration offices at a double-time pace by INS officers to avoid lawyers known to be waiting in public areas of the courthouse ready to provide them with free legal assistance. The subsequent hearings, held without lawyers, were marred by inaccurate and misleading translations, preventing the Haitians from understanding the proceedings. *Jean v. Nelson*, 711 F.2d 1455, 1492 (11th Cir. 1983); *Louis v. Meissner*, 530 F.Supp. 924, 926-927 (S.D. Fla. 1981); Transcript of Trial (hereinafter cited as "T.") at 1596-98.

On June 10, 1981, petitioners filed an emergency habeas corpus petition challenging the procedural fairness

of these hearings and the discriminatory treatment applied only to Haitians. After a hearing that documented the procedural irregularities and the inaccurate, misleading translations at the mass hearings, the government confessed error, but not before respondents improperly deported eleven Haitians. *Jean v. Nelson*, 711 F.2d at 1463 n.1.

At approximately the same time that these unlawful actions took place, the Administration established a new policy of mandatory detention for all aliens seeking asylum.[2] In describing this new policy to the Congress, the Attorney General called for an "evenhanded" rule of detention. *Jean*, 711 F.2d at 1471. At the same time, the President confirmed that administrative action was to be "consistent with fair procedures and our constitution." Statement of the President, United States Immigration and Refugee Policy, July 30, 1981, *cited in Jean*, 711 F.2d at 1470-71. Despite the Attorney General's announcement, the President's statement, and the facial neutrality of the applicable statute, 8 U.S.C. 1182(d)(5)(A)(1982), low-level INS enforcement officials

[2]It did so without complying with the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §553 (1982) (hereinafter cited as "APA"), as the district court and Eleventh Circuit panel found. *Jean*, 711 F.2d at 1474-83; *Louis*, 544 F. Supp. at 993-97. This abruptly changed a long-standing policy, in effect since 1954, of releasing all aliens pending a determination of their admissibility unless the alien was likely to abscond or posed a threat to national security. *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *Jean*, 711 F.2d at 1469.

applied this facially neutral policy discriminatorily against the Haitians, resulting in their prolonged incarceration.[3]

The evidence presented at trial demonstrated an overwhelming and unrebutted stark pattern of discrimination against Haitian refugees sufficient to meet the most exacting requirements for proving intentional discrimination. *Jean*, 711 F.2d at 1494. Petitioners proved that low-level INS enforcement officials intentionally discriminated against black Haitian nationals in initially incarcerating them and in keeping them in prolonged incarceration pending a determination of their claims for political asylum. *Jean*, 711 F.2d at 1487-1502. Petitioners proved discrimination both directly and indirectly through witnesses, documents, and expert statistical analysis of data provided by respondents. *Jean*, 711 F.2d at 1487-1502.

Petitioners demonstrated a pattern of discrimination "as stark as that in *Gomillion* . . . or *Yick Wo*." *Jean*, 711 F.2d at 1489. The Administration's new detention policy, intended to be neutral in coverage, was applied by INS enforcement officials to Haitians in a manner so

[3]The incarceration of Haitians in an invidiously discriminatory manner was devoid of any justification. The Haitians posed no threat to the national security, were not likely to abscond, and represented an insignificant number of undocumented aliens seeking entry in to the United States. *Jean*, 711 F.2d at 1492 n. 38; *Louis*, 544 F. Supp. at 1006. Indeed, the Haitians represented less than 2% of the undocumented immigration into the United States. *Jean*, 711 F.2d at 1492 n. 38. Moreover, INS officials conceded that the Haitians were not incarcerated because they were a threat to national security or likely to abscond. T. 1160, 2035, 2338, 2396, and 2398.

disparate that expert statistical testimony described the chances that the disparity could have occurred at random as "on the order of less than two in ten billion times" and "a statistical joke." *Jean*, 711 F.2d at 1488. Furthermore, the government's own documents dramatically revealed that respondents discriminatorily targeted Haitians for incarceration. *Jean*, 711 F.2d at 1493-94.

The prolonged incarceration of Haitians occurred in the context of a lengthy historical pattern of discrimination by INS officials against the Haitians. *Jean*, 711 F.2d at 1490-91. Numerous witnesses, including "former high-ranking INS and Justice Department officials[,] attested to the persistent targeting and mistreatment of Haitians." *Jean*, 711 F.2d at 1490. The "unrebutted and unexplained" testimony showed "a historical pattern of discrimination under *Arlington Heights*." *Jean*, 711 F.2d at 1491.[4]

[4]The present case, as the panel opinion stated, is merely the latest manifestation of a thoroughly documented stark historical pattern of discriminatory treatment by low-level INS officials against Haitians seeking political asylum. *Jean*, 711 F.2d at 1490-91. For over a decade, INS officials have systematically denied Haitian refugees seeking asylum in this country their right to the fair and impartial administration of our immigration laws. Haitians have been unlawfully denied their statutory and treaty rights to a hearing before an immigration judge in exclusion proceedings on their claims for political asylum. *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated and remanded on other grounds*, 566 F.2d 104 (5th Cir. 1978). They have been unlawfully denied their right to notice of the procedures that the government intended to use against them in exclusion proceedings. *Sannon v. United*

In addition to statistical and historical evidence, the record demonstrated "a plethora" of other evidence of discriminatory intent under *Arlington Heights*. *Jean*, 711 F.2d at 1490. For example, INS officials departed from their normal procedures in the treatment of aliens by cutting off the Haitians' rights to claim asylum or to fair hearings. *Jean*, 711 F.2d at 1492.

The respondents never refuted any of the evidence of invidious discrimination, except to protest that no discrimination was intended. As the panel opinion noted:

> All told plaintiffs mustered an impressive array of witnesses and an equally impressive number of documents to demonstrate circumstantially, and to an extent directly, intentional government discrimination against Haitians. This evidence, in addition to the statistical evidence, was unrebutted but for the government's testimonial evidence, which can at best be termed "mere protestation." Without evidence of similar mistreatment of other immigrant groups, the district court had no factual basis for finding these practices were directed at others, or that they would be directed to others who were similarly situated. Based on the lack of evidence, the district court's findings are clearly erroneous.

Jean, 711 F.2d at 1494.

Respondents discriminated against Haitians not only in the initial and then prolonged incarceration of class members, but also in the manner in which they incarcerated them. Respondents shipped petitioners to federal prisons and INS detention facilities throughout the United States which were located in "desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any Creole interpreters." *Louis v. Meissner*, 530 F. Supp. at 926. Haitians, already represented in Florida by immigration lawyers, were shipped by INS officials from Florida to isolated desert areas such as Big Springs, Texas or other isolated areas such as Raybrook, New York, where immigration counsel were unavailable. The respondents had never treated any other race or nationality in this manner. T. 777, 977; *id.* at 161, 219 (Testimony of former INS General Counsel and preeminent immigration authority Charles Gordon). They separated husbands and wives and parents and children. *Louis v. Nelson*, 544 F. Supp. 973, 981 n.24 (S.D. Fla. 1982); T. 1141, 1479-81. They applied the detention policy to Haitian children, 544 F. Supp. at 981 n.24; Petitioners' Exhibit at trial 45, 46, 48, 62.1 (hereinafter cited as "Px"); the

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(Footnote 4 Continued)

States, 460 F. Supp. 458 (S.D. Fla. 1978). They have been unlawfully denied the right to work during the pendency of their asylum claims. *National Council of Churches v. Egan*, No. 79-2959-Civ-WMH (S.D. Fla. 1979). They have been unlawfully denied access to information to support their asylum claims. *National Council of Churches v. Immigration and Naturalization Service*, No. 78-5163-Civ-JLK (S.D. Fla. 1979). They have been unlawfully denied the very right to be heard on their asylum claims, and have been subjected to a special "Haitian Program." *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982). They have been unlawfully denied their right to counsel and to fair process in their exclusion hearings by being shipped, like cattle, to remote areas of America. *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981). *See Jean v. Nelson*, 711 F.2d at 1490.

elderly, Px. 47, 48; and those with medical problems. Px. 47, 48, 62.1. They held petitioners in substandard facilities and subjected them to harsh conditions. T. 918-19. Some Haitians were physically abused. T. 1224, 1251. Some were denied appropriate care for their medical conditions. T. 1258. Some were moved to other facilities at night, without being permitted to take their own clothes or belongings and without being told where they were going, leading some to be terrified that they were being taken to Haiti. T. 923-25. The district court aptly concluded that the INS was playing a "human shell game" with the Haitians. *Louis u Meissner*, 530 F. Supp. at 926.

The effect of such long term and isolated detention was devastating. The mental health of the Haitians in detention deteriorated rapidly under these conditions. T. 370. Indeed, one of the named plaintiffs, Prophete Tallyrand, commited suicide while incarcerated during the pendency of this litigation.

The actions of INS officials in discriminating against Haitians in these ways, including incarceration itself, was unexplained and unrebutted. Indeed, it was also devoid of any justification. The Haitians posed no threat to national security, were not likely to abscond, and represented an insignificant number of aliens entering the country. *Jean*, 711 F.2d at 1492 n.38; *Louis u Nelson*, 544 F.Supp. at 1006.[5]

[5]Not only did the government offer no justification, but key government officials admitted that the incarceration of Haitians was not based on any belief that they would abscond. T. 1160, 2035, 2338, 2396, 2398. The district court also found that the Haitians were not likely to abscond and posed no security risk. *Louis u Nelson*, 544 F. Supp. at 1006.

As a result of the evidence presented in the district court and extensively reviewed by the Eleventh Circuit panel, the panel affirmed the district court's finding that the fifth amendment applied to the Haitian petitioners, but reversed as "clearly erroneous" its factual determination that petitioners had failed to carry their burden of proving that low-level government officials had intended to discriminate in the incarceration of the Haitians. *Jean*, F.2d at 1509.[6] The panel remanded

[6]The procedural history of the litigation to that point may be briefly summarized. Subsequent to the filing of plaintiff's initial petition, an amended habeas corpus petition and civil class action complaint was filed challenging the discriminatory detention of Haitians by low level INS officials and the failure of the agency to comply with the rulemaking requirements of the APA, 5 U.S.C. §553. *Jean u Meissner*, 90 F.R.D. 658 (S.D. Fla. 1981). The district court had jurisdiction over the original habeas corpus petition under 28 U.S.C. §2241 (1982) and over the amended petition and complaint under 28 U.S.C. §§1331, 2241 (1982) and 8 U.S.C. §1329 (1982). Thereafter, the district court certified the class and enjoined the INS from proceeding against unrepresented Haitians who had been transferred to remote federal prisons and INS facilities. *Louis u Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981). The court certified the class as: "All Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the U.S. and who are presently held in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are unrepresented by counsel." *Louis u Meissner*, 530 F. Supp. at 930. The class was later amended in the Final Judgment to include all Haitians in detention for whom a G-28 (counsel's notice of appearance form) had been filed. *Louis u Nelson*, 544 F. Supp. 1004, 1009 (S.D. Fla. 1982). On June 18, 1982, the district court determined that the INS detention policy was "null and void" because of the government's failure to comply with the rulemaking requirements of the APA. *Louis u Nelson* 544 F. Supp. 973, 1002-04 (S.D. Fla. 1982). The court reinstated the prior policy of parole and ordered the release of class members, some of

to the district court, ordering it to grant broad injunctive relief to petitioners. *Jean*, 711 F.2d at 1509.

On August 16, 1983, the court of appeals ordered rehearing *en banc*. *Jean v. Nelson*, 714 F.2d 96 (11th Cir. 1983). On February 28, 1984, the *en banc* court dismissed the government's appeal on the APA issue as moot and remanded to the district court with instructions to vacate the injunctive relief based on the APA violation. *Jean*, 727 F.2d at 962. The *en banc* court did not disturb the panel's factual findings of invidious discrimination. Nevertheless, it reversed the panel's holding that such discrimination violated the Constitution. The court found that low-level Executive branch officials possess inherent power over immigration matters that is wholly unrestrained by the Constitution. It held broadly that "excludable aliens such as the Haitian plaintiffs have no constitutional rights with respect to their applications for admission, asylum or parole." *Jean*, 727 F.2d at 984.

(Footnote 6 Continued)

whom had been in detention for over a year. *Louis v. Nelson*, 544 F. Supp. 1004, (S.D. Fla. 1982). The court determined that class members could seek protection under the fifth amendment from discriminatory incarceration, 544 F. Supp. at 998, but found that petitioners had failed to prove their claim. *Id.* at 1002-04. The government then sought a stay from the district court of its decision, and when this was denied sought a stay pending appeal from the Eleventh Circuit which was also denied. *Jean v. Nelson*, 683 F.2d 1311 (11th Cir. 1982). Respondents appealed the district court's decision on the rule-making issue and the petitioners cross-appealed on the district court's determination concerning discrimination, as well as on other issues not relevant here.

The court announced a new non-constitutional standard for reviewing alleged abuses of discretion by low-level agency officials, remanding to the district court to determine whether low-level officials had a "facially legitimate and bona-fide reason" for incarcerating and refusing to parole the members of petitioners' class still in detention.[7] Four members of the *en banc* court dissented from the court's constitutional conclusions and its standard for reviewing abuses of discretion by low-level agency officials. *Jean*, 727 F.2d at 986-990.

On May 4, 1984, the court of appeals denied petitioners' request for rehearing *en banc* (App. 158) and for a stay pending petition for a writ of certiorari (App. 157), and entered its final judgment on rehearing *en banc* (App. 156).

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for certiorari for three reasons. First, this case raises a substantial constitutional issue of great national importance never before addressed by the Court. The *en banc* court below found that invidious race and nationality discrimination in the incarceration of a class of aliens was wholly beyond constitutional review even when

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[7]The remand is directed only to those "class members presently in detention." *Jean*, 727 F.2d at 978. The remand is not directed to and provides no relief for the approximately 1700 class members who have been released from detention. In the absence of review by this Court these petitioners would be deprived of injunctive relief to prevent the recurrence of the pattern of discrimination that Haitians have been subjected to for ten years by INS officials. *See Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971); *Jean*, 711 F.2d at 1509-10.

such discrimination was contrary to and neither authorized, directed, permitted nor countenanced by Congress, the President or even the Attorney General, but rather initiated and carried out by low-level government officials. Moreover, until the decision by the *en banc* court, no court, with the exception of this Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), has ever held that a class of persons is wholly beyond the Constitution.

Second, the *en banc* court, in reaching its decision, found controlling *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which it misconstrued and whose continuing validity, in any event, should be reassessed. This Court's decision in *Mezei* did not hold, as the *en banc* court erroneously believed, that excludable aliens have no constitutional protection, and certainly did not suggest that its holding applied to incarceration based upon invidious race and nationality discrimination. Certiorari should accordingly be granted to clarify the meaning of this Court's decision in *Mezei*.

Third, the decision creates a conflict in principle with the decisions of this Court in *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), and *Wong Wing v. United States*, 163 U.S. 228 (1896), and with decisions of the Second Circuit in *Augustin v. Sava*, No. 83-2326 (2d Cir. May 22, 1984), and *Yiu Sing Chun v. Sava*, 708 F.2d 869 (2d Cir. 1983). The *en banc* decision also is contrary to constitutional principles enunciated in the opinions of this Court and the circuits recognizing that excludable aliens are persons within the protection of the fifth amendment.

1. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SUBSTANTIAL AND RECURRING QUESTION OF CONSTITUTIONAL LAW, NEVER BEFORE ADDRESSED BY THIS COURT, WHICH WAS RESOLVED BY THE COURT BELOW IN A MANNER DIRECTLY IN CONFLICT WITH THE EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT AND THE PRINCIPLE THAT THE CONSTITUTION PLACES LIMITS ON ALL GOVERNMENT ACTION.

This petition comes to this Court with a clear and irrefutable record of invidious race and national origin discrimination against the petitioners, which was not challenged by the *en banc* court.[8]

No court of the United States, until the majority decision by the *en banc* court, has ever held that invidious race and national origin discrimination by officials of a federal agency is wholly beyond constitutional scrutiny.

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[8]Although petitioners were treated discriminatorily in a variety of ways, see *supra* pp. 6-12, this petition and, indeed, this case is focused *solely* on the issue of invidious discrimination in the incarceration of excludable aliens. Thus, this case does *not* challenge any decision or the authority of the Congress, the President or even the Attorney General in matters concerning admission of aliens into the country or the right to make distinctions based upon race or national origin in the ultimate decision to admit or exclude aliens. Indeed, it does not even challenge the right of the government to incarcerate aliens in an "evenhanded" non-discriminatory manner. It challenges only proven *invidious* racial and nationality discrimination in the incarceration and prolonged detention of excludable aliens pending a determination of their admissibility.

This decision deserves review, if for no other reason, because it is in direct conflict with the non-discrimination principle fundamental to our constitutional values. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Strauder v. West Virginia*, 100 U.S. 303 (1880). Whatever may be the power of Congress, or the President acting pursuant to delegated authority, to make distinctions based on race or nationality in the admission of excludable aliens, no court has ever previously held that low-level agency officials may invidiously discriminate in incarcerating aliens, particularly where, as here, Congress,[9] the President,[10]

[9]8 U.S.C. 1182 (d)(5)(A)(1982). Indeed, Congress has spoken clearly and unequivocably since 1965 in renouncing all vestiges of *invidious* discrimination in our immigration laws, including even those relating to the admission of aliens. 8 U.S.C. §1152(a) ("No person shall . . . be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth or place of residence. . . .") In 1967, the President, with the advice and consent of the Senate, ratified the United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (*entered into force with respect to the United States*, Nov. 1, 1968) which adopted the express ban in the Convention Relating to the Status of Refugees on discrimination against refugees on the basis of race, religion or country of origin. The principle of non-discrimination was recently reaffirmed with respect to persons seeking asylum such as the petitioners. Refugee Act of 1980, P.L. 96-212, 94 Stat. 109 (1980); see note 16 *infra*.

[10]Statement of the President, United States Immigration and Refugee Policy, July 30, 1981. The President's statement confirmed that administrative action was to be "consistent with fair procedures and our constitution." *Jean v. Nelson*, 711 F.2d at 1470-71; *Louis v. Nelson*, 544 F. Supp. at 980. The President's statement also confirms that he did not seek to invoke or rely on any inherent, reserved or extra-constitutional authority in determining immigration policy, as the *en banc* court suggested.

and the Attorney General[11] have all established a facially neutral policy. *Cf. Hampton v. Mow Son Wong*, 426 U.S. 88 (1976).

Even in *Korematsu v. United States*, 323 U.S. 214 (1944), in the midst of a world war where there was fear of sabotage and invasion and the survival of our nation was at stake, this Court did not abandon the non-discrimination principle and in fact subjected discrimination by the President, sanctioned by Congress, to strict scrutiny. The lower court's refusal to subject low-level discrimination sanctioned by neither the President nor the Congress to *any* constitutional scrutiny is inexplicable, particularly since the record reveals no threat whatsoever to the national interest, or indeed, to any legitimate concern with protecting our borders.[12] The decision amounts to a broad holding that the Constitution can afford no protection whatsoever to excludable aliens subjected as a class to invidious discrimination in the matter of parole pending determination of admissability and that such aliens are, in effect, non-persons under the Constitution. Not since *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393

[11]*Jean v. Nelson*, 711 F.2d at 1471; Px. 31 ("evenhanded" treatment).

[12]There was no justification for the discriminatory detention of Haitians. There was no "massive influx" of Haitians and they constituted less than 2% of the undocumented immigration into the United States. *Jean v. Nelson*, 711 F.2d at 1492 n. 38. Moreover, government officials in effect conceded that Haitians were neither incarcerated because they were a threat to national security nor because they were likely to abscond. T. 1160, 2035, 2338, 2396, 2398. The district court also found that the Haitians were not likely to abscond and posed no security risk. *Louis v. Nelson*, 544 F. Supp. at 1006.

(1857), has a federal court removed a group of persons altogether from the protection of the Constitution.

This Court should also grant certiorari to clarify the important and recurring question of whether and to what extent the Constitution places any limits on the conduct of INS enforcement officials. The rule adopted by the court below leaves the courts without any constitutional tools to deal with INS actions that invidiously discriminate against certain races, nationalities or religions in more extreme forms than even incarceration, not to punish them, but to deter their arrival. The *en banc* court's decision, if not reversed, places beyond constitutional review the actions of low-level officials who engage in such extreme conduct without the approval of Congress, the President or the Attorney General.[13]

The *en banc* court, in reaching its unprecedented conclusions,[14] relied heavily and erroneously on prior

[13]If not reversed, this decision would constitutionally sanction indefinite incarceration of refugees, prior to a determination of excludability, based solely on race, national origin or religion. Thus, INS enforcement officials may tomorrow incarcerate indefinitely Soviet Jews simply *because* they are Jewish or Polish refugees simply *because* they are Polish, just as here, they incarcerated Haitian refugees simply *because*, as the unrefuted evidence shows, they were black and from Haiti.

[14]These conclusions included the *en banc* court's harmful and conceded *obiter dicta* that the President and Attorney General have inherent extra-constitutional powers to discriminate based on national origin. *Jean*, 727 F.2d at 778. The references throughout the *en banc* opinion to a reservoir of inherent Presidential powers, *Jean*, 727 F.2d at 965-67, 978, is wholly unwarranted on the facts of this case where the President did not utilize or seek to utilize any reserved power, but instead stated explicitly that all actions were to be taken "consistent with . . . our constitution." *Jean*, 711 F.2d at 1470-71.

decisions of this Court extending to the nineteenth century that provided broad discretion to the executive in matters concerning the admission of aliens. *Jean*, 727 F.2d 957, 964-967 (11th Cir. 1984). The power to admit or exclude, a sovereign function, is not at issue here. Nor is the sovereign power or political judgment of the Congress, the President or the Attorney General to determine eligibility for admission at issue. This case simply addresses the initial incarceration and refusal to parole a class of aliens because they are of a particular race or nationality prior to any determination of their asylum claims. The inherently political concerns implicit in determinations by the Congress and the President, in exercising the powers of a sovereign nation, regarding admission into our political community, lose their force in the context of non-admission questions such as incarceration,[15] *see* L. Tribe, *American Constitutional Law* 283 (1978), particularly where official power is exercised not by the political branches of our government, but by politically unresponsive lower-level enforcement officials.

There are additional compelling reasons why the Court should resolve these questions now. First, this decision raises issues of great consequence to the nation

[15]The *en banc* court bypasses this critical distinction by treating incarceration as "related" to admission in order to fit the facts of this case into *Mezei*. But to state that questions of admission and incarceration pending a determination of asylum are related does not, as the *en banc* court erroneously believed, end the inquiry into constitutional review. The underlying policy interests, purposes and issues of political sovereignty that form the basis of our constitutional doctrines concerning the admission of aliens are not implicated in how we treat aliens while the question of their admission is being determined.

which affect thousands of excludable aliens, many seeking political asylum, including those presently within the country. Some of these aliens have already been directly affected by the *en banc* court's constitutional holding. In *Fernandez-Roque v. Smith*, No. 83-8628 (11th Cir. June 1, 1984), the Eleventh Circuit, relying upon *Jean*, found the *en banc* court's constitutional holding dispositive in reversing a district court's order to provide petitioners due process hearings on their claims for release.

Moreover, the outcome of this case is of considerable concern to the world community. The detention of petitioners provoked unfavorable press coverage throughout the world, impelled a visit by the United Nations High Commissioner of Refugees, and brought the first on-site human rights investigation in the United States by the Organization of American States. The issues are also significant because they test our nation's fidelity to the rule of law in the international community, specifically our solemn treaty obligations under the United Nations Charter and the United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (*entered into force with respect to the United States*, Nov. 1, 1968), not to discriminate against refugees on the basis of race and nationality.

2. THE COURT BELOW RELIED UPON A DECISION OF THIS COURT WHICH IT MISCONSTRUED AND WHICH HAS DOUBTFUL VALIDITY

In reaching its conclusion that excludable black Haitian refugees who have suffered incarceration due

to invidious racial and national origin discrimination have no constitutional protection, the *en banc* court relied on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The court found that decision "controlling on this issue" and it "forecloses us from relying on the arguments that the panel and the district court found persuasive." *Jean*, 727 F.2d at 969-70.

In relying on *Mezei* as "controlling" precedent in a case of invidious race and national origin discrimination, the *en banc* court misconstrued that precedent and extended it beyond its intended scope. This Court should grant review to decide whether *Mezei* should be extended, as the lower court did, to condone invidious race and nationality discrimination in the incarceration of petitioners, pending determination of their claims for asylum, by low-level immigration officials acting pursuant to neutral legislation and administrative policy.

The lower court's decision to extend *Mezei* to permit invidious discrimination by low-level enforcement officials against excludable aliens results from its misunderstanding of that decision. The lower court's decision missed the central distinction between the existence of constitutional protection and the extent or scope of that protection. In *Mezei*, this Court did not hold that Mezei had *no* constitutional rights or that his detention was justified by inherent or extra-constitutional authority, but only that the extent of his procedural and substantive due process rights to parole were limited under the peculiar facts of that case. The extent of equal protection

guarantees for excludable aliens was not decided or even at issue in *Mezei*.[16]

Moreover, the upholding of Mezei's detention was influenced by national security concerns in a cold war context, and by the fact that Mezei's release as a practical matter would have been tantamount to admission, since no country would accept him if the government sought to enforce deportation. On the contrary, in this case, the court below found that Haiti will take any petitioners back who are not adjudged to be entitled to asylum. Therefore, this case does not present, as did *Mezei*, the assertion of constitutional rights which, in effect, would convert or bootstrap the petitioners' release from detention into admission.[17]

Furthermore, this Court should grant review to clarify the extent to which *Mezei* has continuing validity. *Mezei* has been severely criticized,[18] and its continuing validity in light of subsequent constitutional developments is doubtful.[19]

3. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AS WELL AS THOSE OF OTHER CIRCUITS

The decision of the *en banc* court is in conflict with the principles announced by this and lower courts that excludable aliens are covered by the Constitution. This

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[16]The decision to regard *Mezei* as a "controlling" precedent which sanctions invidious discrimination is particularly dubious in light of congressional enactments subsequent to the decision. In January 1965, the Congress abolished the national quota system thereby eliminating the vestiges of invidious racial or nationality based discrimination in the immigration statutes. The legislative history is replete with references to the need to eliminate invidious discrimination. Hearings on S. 500, 89th Cong., 1st Sess., Part 1 45-48, 217-220 (1965); 111 Cong. Rec. 21759, 21764, 21787, 24238 (1965). The 1965 Act not only abolished the national origin quota system, but also specifically established a statutory bar to invidious discrimination based on race and nationality. 8 U.S.C. §1152(a) (1982). Additionally, the Refugee Act of 1980 specifically sought to end nationality based distinctions in our treatment of refugees by accepting the United Nations Convention and Protocol's definition of refugee. S. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980); 8 U.S.C. §1101(a)(42)(1982).

[17]Only temporary parole is involved here. The parole involved is not parole into the country in the sense of admission, but rather temporary release from custody pending determination of asylum and final excludability. Such release does not affect the alien's immigration status. 8 U.S.C. §1182(d)(5)(A); *Kaplan v. Todd*, 267 U.S. 228 (1925). Unlike the case here, where Haitians are subject to deportation or exclusion, the parole sought by Mezei would have been a *de facto* admission, not permitted under *Kaplan*, because the United States could not deport Mezei as no country would accept him. *Mezei*, 345 U.S. at 208-09.

[18]*See*, e.g., K. Davis, 1 *Administrative Law Treatise* §7.15 at 480-82 (1958); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1387-96 (1953); Martin, *Due Process And The Treatment Of Aliens*, 44 U. Pitt. L. Rev. 165, 173-80 (1983); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum. L. Rev. 957 (1982).

[19]Indeed, the *en banc* court recognized that the decision has been "heavily criticized" and is "controversial." *Jean*, 727 F.2d at 971.

Court has never held that excludable aliens are beyond the reach of the protection of the Constitution, but only that the extent of their constitutional protection varies depending on the circumstances and the government interest involved. Indeed, this Court has recently reaffirmed the principle that immigration status is irrelevant for determining whether or not the Constitution applies to aliens. *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("whatever his status under the immigration laws, an alien surely is a person in any ordinary sense of that term.").

The holding of the *en banc* court is fundamentally inconsistent with this Court's decisions in *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), and *Wong Wing v. United States*, 163 U.S. 28 (1896). In *Russian Volunteer Fleet*, this Court found that aliens not within the territorial boundaries of the United States could invoke the protection of the fifth amendment. In that case, the petitioner, Russian Volunteer Fleet, was a Soviet corporation seeking to recover damages for the expropriation of its property. This Court extended the protection of the fifth amendment beyond even natural persons such as petitioners herein to artificial persons—foreign corporations. Chief Justice Hughes, citing *Wong Wing*, held that "[t]he petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution." *Russian Volunteer Fleet*, 282 U.S. at 489. If the petitioner in *Russian Volunteer Fleet*—an alien corporation outside the territorial jurisdiction of our country—could assert the protection of the Constitution, then *a fortiori*, a natural person physically present within our borders should be able to do so.

Russian Volunteer Fleet cannot be reconciled with the decision of the *en banc* court. An excludable alien cannot be a "person" within the meaning of the fifth amendment for some purposes and not for others. The language of the fifth amendment is plain and unambiguous. It protects "persons" irrespective of status. Although the extent of protection under the fifth amendment may vary in different contexts,[20] the threshold determination of whether a class of individuals is covered by the constitution cannot vary because of public policy considerations, as the *en banc* court found. *See Jean*, 727 F.2d at 972-74. The *en banc* court's failure to recognize petitioners as "persons" within the coverage of the fifth amendment thus places it in conflict with this Court's decision in *Russian Volunteer Fleet*, as well as in conflict with the decisions of other circuits which have recognized that excludable aliens in various contexts are protected by the fifth amendment.[21]

The *en banc* court's decision is also in conflict with the principles announced in *Wong Wing v. United States*, 163 U.S. 228 (1896). In *Wong Wing*, this Court recognized that regardless of an alien's status in this country, federal courts may review challenges to an alien's detention under the fifth amendment. The *en banc* court's holding that an incarcerated excludable alien may not invoke the Constitution to challenge incarceration

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[20]There is no context which could ever permit invidious discrimination.

[21]*Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *United States v. Demanett*, 629 F.2d 862 (3d Cir. 1980), *cert. denied*, 450 U.S. 910 (1980); *United States v. Henry*, 604 F.2d 908 (5th Cir. 1979); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

on a discriminatory basis is in direct conflict with the principle of *Wong Wing* that aliens may assert the fifth amendment in the immigration context to challenge their detention.[22]

Moreover, the *en banc* decision is clearly in conflict with the principles expressed in *Augustin v. Sava*, No. 83-2326 (2d Cir. May 22, 1984), and *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983). In *Augustin*, the Second Circuit Court of Appeals reversed a final order of exclusion entered against a member of the class currently petitioning in this case.[23] The court found that in addition to a breach of statutory rights, Augustin's right to due process was implicated despite his status as an excludable alien, where the translations in his asylum hearing were so inadequate as to prevent him from having a reasonable opportunity to present his claim for withholding of exclusion under 8 U.S.C. §1253(h). The court found that "it appears likely that some due process protection" surrounds the determination of his claim. In relying on an earlier Second Circuit precedent, *Yiu Sing Chun v. Sava*, 708 F.2d 869 (2d Cir. 1983), the court found that an excludable alien's "interest in not

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[22]The decision in *Wong Wing* occurred before this Court's decision in *The Japanese Immigrant Case* (*Kaoru Yamataya v. Fischer*), 189 U.S. 86 (1903). Thus, as the *en banc* court properly recognized, *Wong Wing* cannot be distinguished from this case on the grounds that it involved a deportable rather than an excludable alien. *Jean*, 727 F.2d at 973 n. 22.

[23]After Augustin's release from incarceration by virtue of the district court's order in this case, *Louis v. Nelson*, 544 F. Supp. 1004, his asylum hearing, which is the subject of the Second Circuit's opinion, was reviewed in habeas proceedings in the United States District Court for the Southern District of New York.

being returned [to a country where he fears persecution] may well enjoy some due process protection . . . ." *Chun*, 708 F.2d at 877. The *en banc* court's broad holding that there is no constitutional protection for excludable aliens in asylum or parole, then, is in direct conflict with the Second Circuit's determination that due process rights may be granted in the immigration context to excludable aliens in certain circumstances. This Court, therefore, should grant review to resolve this conflict in the circuits.

CONCLUSION

The issues presented are important ones. They affect the daily operation of the Immigration and Naturalization Service. They affect the rights of thousands of aliens coming to our shores to seek political asylum. The decision below, by granting broad and unfettered authority to low-level immigration officials to discriminate invidiously even in the face of neutral statutes and directives, has discarded a constitutional principle that has stood for over a century: Government officials may not invidiously discriminate against a group of persons because of their race and nationality. It discarded that principle in a fashion which cannot be reconciled with the applicable principles of non-discrimination historically sanctioned by the Constitution and by this Court.

For these reasons, this Court should grant certiorari.

Respectfully submitted,

*Ira J. Kurzban, Esq.
National Emergency Civil
Liberties Committee and
Haitian Refugee Center, Inc.
Kurzban, Kurzban & Weinger, P.A.
700 Brickell Avenue, Suite 901
Miami, Florida 33131
(305) 371-0268

Counsel of Record

Bruce J. Winick, Esq.
American Civil Liberties Union
Foundation of Florida, Inc.
University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida 33124
(305) 284-2971

Irwin P. Stotzky, Esq.
University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida
(305) 284-3041

Christopher Keith Hall, Esq.
National Emergency Civil
Liberties Committee and
Haitian Refugee Center, Inc.
Kurzban, Kurzban & Weinger, P.A.
700 Brickell Avenue, Suite 901
Miami, Florida 33131
(305) 371-0268

Michael Rosen, Esq.
American Civil Liberties Union
Foundation of Florida, Inc.
West Flagler Street
Miami, Florida 33131
(305) 377-3736

Of Counsel:
Fried, Frank, Harris,
Shriver & Jacobson
One New York Plaza
New York, New York 10004
(212) 820-8000
By Robert E. Juceam, Esq.
Terrence A. Corrigan, Esq.

APPENDIX

84-5240

Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MARIE LUCIE JEAN, ET AL.,

Petitioners,

v.

ALAN NELSON, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Counsel:

Bruce J. Winick, Esq.
Irwin P. Stotzky, Esq.
Christopher Keith Hall, Esq.
Michael Rosen, Esq.

Of Counsel:

Robert E. Juceam, Esq.
Terrence A. Corrigan, Esq.

Counsel of Record:

Ira J. Kurzban, Esq.
Kurzban, Kurzban & Weinger, P.A.
Suite 901
700 Brickell Avenue
Miami, Florida 33131

Attorneys for Petitioners

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The cross-petitioners also suggest that the present controversy is, with the passage of time, moot, since the collective bargaining agreement between the International Union and Garland has now expired. We do not believe the matter is moot. Nor do we find the remedial orders overly broad. Therefore, the order should be enforced.

Order enforced.

Marie Lucie JEAN, et al., Plaintiffs,

Lucien Louis, et al.,
Plaintiffs-Appellees-Cross-Appellants,

State of Florida, Intervenor-Appellant,

v.

Alan C. NELSON, et al.,
Defendants-Appellants-Cross-Appellees.

No. 82-5772.

United States Court of Appeals,
Eleventh Circuit.

Feb. 28, 1984.

In a class action brought on behalf of Haitian aliens detained in various facilities, the United States District Court for the Southern District of Florida, Eugene P. Spellman, J., 544 F.Supp. 973, entered judgment from which an appeal and cross appeals were taken. Following a panel decision, 711 F.2d 1455, the Court of Appeals, Vance, Circuit Judge, held that: (1) excludable aliens have no constitutional rights with respect to their applications for admission, asylum or parole; (2) courts have authority to review decisions of executive officials in immigration area to ensure that they exercised discretion in accordance with applicable statutes, regulations and announced policies of their agencies; and (3) notice of opportunity to apply for asylum was not mandated.

Dismissed in part, reversed in part and remanded with instructions.

Tjoflat, Circuit Judge, filed opinion concurring in part and dissenting in part.

Kravitch, Circuit Judge, filed opinion specially concurring in part and dissenting in part, in which opinion Johnson, Hatchett and Clark, Circuit Judges, joined.

See also 532 F.Supp. 881.

1. Aliens ⇐40

Aliens may be denied admission on grounds that would be constitutionally impermissible or suspect in context of domestic legislation; disapproving, *Haitian Refugee Center v. Smith*, 676 F.2d 1023. Immigration and Nationality Act, § 212(d)(5)(A), as amended, 8 U.S.C.A. § 1182(d)(5)(A); Executive Order No. 12324, § 1 et seq., 8 U.S.C.A. § 1182 note.

2. Aliens ⇐39

Political branches of federal government possess concurrent authority over immigration matters, and Congress may exercise its implied powers in immigration field through legislative powers while executive exercises power delegated by Congress through statutes or inherent power arising out of executive's plenary authority over foreign relations. U.S.C.A. Const.Amends. 5, 14; Immigration and Nationality Act, §§ 103(a), 212(d)(5)(A), as amended, 8 U.S.C.A. §§ 1103(a), 1182(d)(5)(A); Executive Order No. 12324, § 1 et seq., 8 U.S.C.A. § 1182 note.

3. Constitutional Law ⇐62(9)

Normally Congress supplies conditions of privilege of entry into United States, but because power of exclusion of aliens is also inherent in Executive Department, Congress may in broad terms authorize executive to exercise power without raising delegation concerns. Immigration and Nationalijty Act, §§ 103(a), 212(d)(5)(A), as amended, 8 U.S.C.A. §§ 1103(a), 1182(d)(5)(A); Executive Order No. 12324, § 1 et seq., 8 U.S.C.A. § 1182 note.

4. Aliens ⇐44

Principal responsibility for immigration matters in executive branch resides with Attorney General, who is beneficiary of broad grants of discretion under statute. Immigration and Nationality Act, § 103(a), as amended, 8 U.S.C.A. § 1103(a).

5. Constitutional Law ⇐72

Judicial scrutiny of decisions by political branches in immigration area is not altogether precluded, and such principle applies to executive as well as congressional action. Immigration and Nationality Act, §§ 212(d)(5)(A), (f), 215(a)(1), as amended, 8 U.S.C.A. §§ 1182(d)(5)(A), (f), 1185(a)(1); Executive Order No. 12172, § 1–101 et seq., 8 U.S.C.A. § 1182 note.

6. Constitutional Law ⇐77

As result of existence of inherent executive power over immigration and broad delegations of discretionary authority in the Immigration and Nationality Act, separation-of-powers doctrine places few restrictions on executive officials in dealing with aliens who come to this country in search of admission or asylum, but authority of companion branch is not only source of restraint upon executive action. Immigration and Nationality Act, §§ 212(d)(5)(A), (f), 215(a)(1), as amended, 8 U.S.C.A. §§ 1182(d)(5)(A), (f), 1185(a)(1); Executive Order No. 12172, § 1–101 et seq., 8 U.S.C.A. § 1182 note.

7. Constitutional Law ⇐274.3

Resident aliens, without regard to legal status, are entitled to at least limited due process rights, but as to aliens who have never been naturalized and who never acquired any domicile or residence and have not even been admitted into country pursuant to law, decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. Immigration and Nationality Act, §§ 212(d)(5)(A), (f), 215(a)(1), as amended, 8 U.S.C.A. §§ 1182(d)(5)(A), (f), 1185(a)(1); Executive Order No. 12172, § 1–101 et seq., 8 U.S.C.A. § 1182 note; Proclamation No. 4865, 8 U.S.C.A. § 1182; U.S.C.A. Const.Amend. 5.

8. Aliens ⇐53.9

Alien's legal status is not altered by detention or parole under entry doctrine fiction. Immigration and Nationality Act, §§ 106(b), 212(d)(5)(A), 233(a), 235(b), 236(a, b), 243(h), 292, as amended, 8 U.S.C.A. §§ 1105a(b), 1182(d)(5)(A), 1223(a), 1225(b), 1226(a, b), 1253(h), 1362; U.S.C.A. Const. Amend. 5.

9. Constitutional Law ⇐242.1(1)

Applicability of alien entry doctrine fiction is not limited to challenges relating to admission decision itself, and Haitian plaintiffs who had not been admitted and who were excludable aliens could not claim equal protection rights under Fifth Amendment even with regard to challenging executive's exercise of its parole discretion. Immigration and Nationality Act, §§ 106(b), 212(d)(5)(A), 233(a), 235(b), 236(a, b), 243(h), 292, as amended, 8 U.S.C.A. §§ 1105a(b), 1182(d)(5)(A), 1223(a), 1225(b), 1226(a, b), 1253(h), 1362; U.S.C.A. Const.Amend. 5.

10. Aliens ⇐40

The reason that Congress passed legislation regulating admission of aliens is its concern about how their entry will affect economic, political and social well-being of the nation. Immigration and Nationality Act, §§ 106(b), 212(d)(5)(A), 233(a), 235(b), 236(a, b), 292, as amended, 8 U.S.C.A. §§ 1105a(b), 1182(d)(5)(A), 1223(a), 1225(b), 1226(a, b), 1362.

11. Aliens ⇐53.9

Parole to alien is act of extraordinary sovereign generosity, granting temporary admission into our society to alien who has no legal right to enter and would probably be turned away at border if he sought to enter by land, rather than coming by sea or air. Immigration and Nationality Act, §§ 212(d)(5)(A), (f), 215(a)(1), as amended, 8 U.S.C.A. §§ 1182(d)(5)(A), (f), 1185(a)(1).

12. Aliens ⇐53.9

Since immediate implications of parole and legal admission of aliens are identical in number of important respects, excludable aliens cannot challenge either admission or parole decisions under claim of constitution-

al rights. Immigration and Nationality Act, §§ 212(d)(5)(A), (f), 215(a)(1), as amended, 8 U.S.C.A. §§ 1182(d)(5)(A), (f), 1185(a)(1).

13. Aliens ⇐53

Degree of constitutional protection to be accorded in a particular situation is determined by such factors as legal status of alien and context of government action he seeks to challenge, and thus, e.g., those with status of deportable aliens are constitutionally entitled to rights in deportation context that are inapplicable to exclusion proceedings, while illegal or resident aliens may also claim other rights under Fifth and Fourteenth Amendments. Immigration and Nationality Act, §§ 106(b), 212(d)(5)(A), 233(a), 235(b), 236(a, b), 292, as amended, 8 U.S.C.A. §§ 1105a(b), 1182(d)(5)(A), 1223(a), 1225(b), 1226(a, b), 1362; U.S.C.A. Const.Amend. 14.

14. Administrative Law and Procedure ⇐305, 741

Agencies must respect statutory limits on their discretion, and agency deviation from its own regulations and procedures may justify judicial relief in case otherwise properly before the court. 5 U.S.C.A. §§ 551 et seq., 551(4), 553(a)(1), (b)(A, B), (c).

15. Aliens ⇐54.3(3)

Discretionary decisions of executive officials in immigration area are subject to extremely limited judicial review, and both executive and congressional actions are to be regulated by judiciary according to same narrow standard of review.

16. Aliens ⇐54.3(3)

Critical question for court in reviewing alien's challenge to denial of his request for parole is whether immigration officials involved were acting within scope of their delegated powers, including remarkably broad discretion delegated to executive officials under the Immigration and Nationality Act. Immigration and Nationality Act, § 212(d)(5)(A), as amended, 8 U.S.C.A. § 1182(d)(5)(A).

17. Aliens ⇐53.9

Obverse of grant of discretionary authority to parole an excluded alien is grant of authority to deny parole, and immigration officials have authority to deny parole to unadmitted aliens if officials can advance facially legitimate and bona fide reason for doing so. Immigration and Nationality Act, §§ 103(a), as amended, 212(d)(5)(A), as amended, 235(b), 237(a), 242(c), as amended, 8 U.S.C.A. §§ 1103(a), 1182(d)(5)(A), 1225(b), 1227(a), 1252(c).

18. Aliens ⇐44

Responsible executive officials such as President or Attorney General possess authority under the Immigration and Nationality Act to discriminate on basis of national origin. U.S.C.A. Const.Amends. 5, 14; Immigration and Nationality Act, §§ 212(d)(5)(A), 235(b), 237(a), 242(c), as amended, 8 U.S.C.A. §§ 1182(d)(5)(A), 1225(b), 1227(a), 1252(c).

19. Aliens ⇐53.9

Although executive's policy was consistent with power delegated by Congress, it was still necessary for district court to determine whether actions of low-level officials in the field, in denying parole to Haitian immigrants, conformed to policies of the superiors in Washington, and the district court on remand was to determine whether there was facially legitimate and bona fide reason for government's decision to deny parole to the class members presently in detention. Immigration and Nationality Act, §§ 103(a), 106, 235(b), 237(a), 242(c), as amended, 8 U.S.C.A. §§ 1103(a), 1105a, 1225(b), 1227(a), 1252(c).

20. Aliens ⇐54.3(1)

Statute providing that alien against whom final order of exclusion has been made may obtain judicial review by habeas corpus proceedings and not otherwise did not preclude claims of Haitian aliens that they had right to notice of opportunity to seek asylum, but judicial holding to such effect was one not to be construed as permitting judicial review of run-of-the-mill interlocutory procedural rulings by immigration judge with which alien happens to

disagree. Immigration and Nationality Act, §§ 101(a)(42), 106, 106(b), 208(a), 243(h), as amended, 8 U.S.C.A. §§ 1101(a)(42), 1105a, 1105a(b), 1158(a), 1253(h); 28 U.S.C.A. § 1331.

21. Aliens ⇐54.3(1)

Under applicable regulations, if alien does not file application for asylum with district director before commencement of exclusion proceedings against him, such first opportunity to seek asylum is simply lost, and existence of unexhausted administrative remedies, such as request to withhold deportation, applicable to alien's opportunity to apply for asylum before immigration judge cannot justify invoking exhaustion doctrine with respect to challenge to procedure before district director. Immigration and Nationality Act, §§ 106, 106(b, c), 243(h), as amended, 8 U.S.C.A. §§ 1105a, 1105a(b, c), 1253(h).

22. Constitutional Law ⇐252.5

When dispensation of statutory benefit is clearly at discretion of an agency, or when statute only provides that certain procedural guidelines be followed in arriving at decision, then there is no creation of substantive interest protected by the Constitution. U.S.C.A. Const.Amends. 5, 14.

23. Aliens ⇐53.10(3)

Constitutional Law ⇐274.3

Refugee Act does not create an entitlement to asylum, and carries with it no guarantee of securing the substantive relief sought, and thus the grant of asylum does not create interest protected by due process clause. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C.A. § 1158(a); U.S.C.A. Const.Amends. 5, 14.

24. Aliens ⇐53.10(2)

Notice of opportunity of alien to apply for asylum before district director is not clearly mandated by terms of the Refugee Act, and no right to notice derives a fortiori from establishment of asylum procedure, and thus although aliens have protected statutory and regulatory right to petition for asylum, Immigration and Nationality Service is not required to inform all potential applicants of their right to seek asylum. Immigration and Nationality Act, § 243(h), as amended, 8 U.S.C.A. § 1253(h); U.S.C.A. Const.Amends. 1, 5.

25. Constitutional Law ⇐42.1(1)

Where substantial number of class members were being held in detention, claim of First Amendment violation by frustration of efforts of attorneys to inform aliens of their legal rights was not moot. U.S.C.A. Const.Amend. 1.

26. Aliens ⇐54.3(1)

Because regulation of aliens in detention could implicate security concerns similar to those applying in prison context, there was issue for district court with respect to restrictions on contacts between outsiders and Haitian detainees, frustrating efforts of attorneys to inform them of their legal rights. Immigration and Nationality Act, § 212(d)(5)(A), as amended, 8 U.S.C.A. § 1182(d)(5)(A).

Stanley Marcus, U.S. Atty., Sonia O'Donnell, Asst. U.S. Atty., Miami, Fla., Leon B. Kellner, New York City, Robert L. Bombaugh, Rudolph W. Giuliani, Associate Atty. Gen., Barbara L. Herwig, Michael Jay Singer, Appellate Staff, Civ.Div., Dept. of Justice, Washington, D.C., Nade E. Strickland, Crim. Investigator, U.S. INS, Dept. of Justice, Atlanta, Ga., for defendants-appellants-cross-appellees.

Kurzban & Kurzban, Ira J. Kurzban, Miami, Fla., Mary Gilmore, Terrence A. Corrigan, New York City, Michael J. Rosen, Miami, Fla., Christopher Keith Hall, Coral Gables, Fla., for plaintiffs-appellees-cross-appellants.

Vera Weiss, Haitian Refugee Center, Inc., Miami, Fla., Bruce J. Winick, ACLU Foundation of Fla., Inc., Irwin P. Stotzky, Univ. of Miami, School of Law, Coral Gables, Fla., for Haitian Refugee Center.

J. Kendrick Tucker, Deputy Atty. Gen., Tallahassee, Fla., for intervenor State of Fla.

Dan Paul, Paul & Thomson, Steven M. Kamp, Miami, Fla., for amicus American Immigration Lawyers Ass'n.

Arthur C. Helton, Lawyers Committee for Intern. Human Rights, Richard Simpson, Elise A. Bloustein, Robert L. Weigel, Philip S. Weber, New York City, for amicus Immigration Law Clinic of Columbia University School of Law and Lawyers Committee for Intern. Human Rights.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

VANCE, Circuit Judge:

This case presents complex and fundamental constitutional questions concerning the rights of excludable or unadmitted aliens[1] and the authority of the Executive branch over immigration matters. It arises out of a class action brought on behalf of Haitian aliens who arrived in the Southern District of Florida on or after May 20, 1981 and were detained at various facilities of the Immigration and Naturalization Service (INS) pending a final determination of the merits of their petitions for asylum.[2]

Plaintiffs allege that their incarceration was improper for two reasons. First, they contend that the government improperly failed to comply with the notice and comment provisions of the Administrative Procedure Act (APA) when it adopted a new practice of detaining aliens who could not establish a prima facie claim of admission to this country, rather than paroling them pending a hearing on their petitions for admission to asylum. Second, plaintiffs assert that the new detention policy is illegal because it is discriminatory either on its face or in its application, since Haitian aliens appear to be disproportionately affected by the new policy.

The district court concluded that the policy had not been applied in a discriminatory manner, but ruled that the government had failed to comply with the requirements of the APA and ordered the release of the detained class members. *Louis v. Nelson [Louis III]*, 544 F.Supp. 973 (S.D.Fla.1982). A panel of this court subsequently affirmed the district court's decision with regard to the requirements of the APA, but found

1. In this opinion aliens who have reached our border but have not formally been admitted to the United States are described as "excludable" or "unadmitted" aliens. These terms should be understood as synonymous with "non-resident" or "excluded" aliens and "aliens denied entry." Aliens who have succeeded in effectig an "entry in contemplation of law" are described as "deportable" or "resident" aliens. These terms can apply both to aliens who have been permitted to enter by immigration officials and to those who have succeeded in entering this country illegally. We will use the term "exclusion" to refer to the process of excluding and deporting an excludable alien, and "deportation" to describe the process of expelling and deporting a resident alien.

Although "deportation" and "expulsion" technically refer only to the required departure of a resident alien, they are sometimes used informally by the courts to refer to any removal of an alien from this country, regardless of status. When used in this manner, however, it should be understood that these terms "reflect[ ] none of the technical gloss accompanying [their] use as ... word[s] of art" in the sections of the immigration laws referring to the removal of resident aliens. *Leng May Ma v. Barber*, 357 U.S. 185, 187, 78 S.Ct. 1072, 1073, 2 L.Ed.2d 1246 (1958). For one commentator's attempt to parse out this terminological confusion, see Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 Yale L.J. 760, 761 n. 8 (1962).

2. The class certified by the district court comprises:

> All Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and also are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either:
> 1) Unrepresented by counsel; or
> 2) Represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.

Louis v. Nelson [Louis III], 544 F.Supp. 973, 984 (S.D.Fla.1982).

that the district court had erred in holding that plaintiffs had failed to demonstrate that the government's actions were the product of discriminatory intent. *Jean v. Nelson*, 711 F.2d 1455, *reh'g en banc granted*, 714 F.2d 96 (11th Cir.1983). We now reverse and remand for further findings by the district court. Because the facts of this case have been extensively set forth in the opinions of the panel and the district court, we proceed directly to a discussion of the legal questions involved.

I. COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT

Count Two of plaintiffs' complaint asserted that the new detention policy adopted by the Administration in the summer of 1981 constituted a "rule" within the meaning of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 551(4), and that the government's failure to comply with the rulemaking procedures of the APA rendered the plan void and unenforceable. An administrative agency generally cannot adopt a substantive rule without first publishing notice of the proposed regulation and providing interested parties with an opportunity to comment. *Id.* § 553(b), (c). The government conceded that it had not followed these procedures when it adopted the new detention policy, but argued that it was exempt from these requirements on the grounds that the new approach was not a "rule" within the meaning of the APA. Alternatively, the government argued that even if the new detention program did constitute a rule, it fell within the foreign affairs, interpretative rules, and general statements of agency policy exceptions to the APA's rulemaking requirements. *See id.* § 553(a)(1), (b)(A) & (B). The district court rejected these arguments. *Louis III*, 544 F.Supp. at 997. It ordered the government to parole the class members then detained and enjoined the government from enforcing its new detention program until the INS complied with the rulemaking procedures of the APA. *Louis v. Nelson [Louis IV]*, 544 F.Supp. 1004, 1006 (S.D.Fla.1982).

After the district court rendered its decision, the government promulgated new regulations in accordance with the APA. *See* 8 C.F.R. § 212.5 (1982). At oral argument before this court counsel for petitioners stated that one hundred or more class members are currently being held in detention, but these detainees either had their parole revoked for failure to comply with the terms of the district court's order, *see Louis IV*, 544 F.Supp. at 1009, or arrived in this country after the government's promulgation of its new regulations. Because the government is no longer detaining any class members except pursuant to the new regulations, the APA issue as originally presented has been rendered moot. The validity of these new regulations is not before this court, and we express no opinion in this regard. We accordingly dismiss the appeal as to Count Two of plaintiffs' complaint and remand with instructions that this part of the district court's judgment be vacated.

II. THE EQUAL PROTECTION CLAIM

The central question raised by this case in its present posture is whether the Haitian plaintiffs may invoke the equal protection guarantee of the fifth amendment's due process clause as a basis for challenging the government's refusal to grant them parole. The district court, reasoning that "the [Supreme] Court has never held [that] 'the Constitutional guarantees of the Fifth Amendment do not apply to unadmitted aliens,'" *Louis III*, 544 F.Supp. at 996, decided that it could reach the merits of the Haitians' claim that the government's new restrictive parole policy was being applied in a discriminatory manner. The lower court noted that a string of Supreme Court decisions beginning with *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) have recognized that aliens are "persons" for the purposes of the fifth and fourteenth amendments and concluded that "[p]laintiffs are entitled to the same constitutional protections afforded all persons within the territorial jurisdiction of the United States." *Louis III*, 544 F.Supp. at 996; *see also Jean*, 711 F.2d at 1484. The district court conceded that the Supreme

Court has repeatedly stressed that excludable aliens have no constitutional rights with respect to their applications for admission into this country, but it distinguished this case on the grounds that "the[ ] claim before this Court does not relate to admission and does not challenge Congress' power in that regard. Plaintiffs' claim is that they cannot be denied parole, pending a determination of their admissibility, because of their race and/or national origin." *Louis III*, 644 F.Supp. at 998; *see also Jean*, 711 F.2d at 1484–85.

The lower court also emphasized that while prior Supreme Court decisions have recognized that there are few if any limitations on Congress' power to formulate guidelines and procedures governing the exclusion of unadmitted aliens, even excludable aliens must receive from the Executive whatever degree of due process protection has been authorized by Congress. Thus, the district court held that if Congress intended the statutes under which the INS acted to be applied neutrally to all excludable aliens, the judiciary could review the Haitian plaintiffs' claim that executive officials violated their fifth amendment rights to due process and equal protection by exercising their discretionary parole authority in a discriminatory manner. *Louis III*, 644 F.Supp. at 998–99; *see also Jean*, 711 F.2d at 1485.

The district court therefore stressed that this case involves a challenge to detention, rather than admission. The court below also drew a sharp distinction between the actions of the legislative and the executive branches, asserting that while Congress is free to discriminate in adopting policies that govern the admission or the processing of excludable aliens, the Executive is prohibited from doing so in the absence of an express congressional mandate. We conclude, however, that the lower court's reasoning is flawed with regard to both points. It is our view that the decision to parole or detain an excludable alien is an integral part of the admissions process and that the grant of discretionary authority to the Attorney General under 8 U.S.C. § 1182(d)(5)(A) permits the Executive to discriminate on the basis of national origin in making parole decisions.

The Executive, however, apparently contends that its parole policy does not discriminate on the basis of national origin,[3] and the new regulations adopted by the INS during the pendency of this suit utilize facially neutral criteria. *See* 8 C.F.R. § 212.5. The question that the district court must therefore consider with regard to the remaining Haitian detainees is thus not whether high-level executive branch officials such as the Attorney General have the discretionary authority under the Immigration and Nationality Act (INA) to discriminate between classes of aliens, but whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors. *See Bertrand v. Sava*, 684 F.2d 204, 212 n. 12 (2d Cir.1982). We remand to the district court for reconsideration of this issue in light of this opinion.

A. *Immigration and the Authority of the Political Branches*

Every nation has the right to refuse to admit a foreigner into the country....

3. Neither the President's statement of July 30, 1981, nor the Attorney General's testimony before Congress that same day discussed the Administration's new detention policy in any detail. The President spoke only in general terms about the need to "establish control over immigration" and to ensure that foreigners are admitted into this country "in a controlled and orderly fashion." The Attorney General discussed "the necessity of detaining illegal aliens pending exclusion" and noted that "[b]y treating those who arrive by sea in the same way we have long treated those who arrive over our land borders, our policy will be evenhanded...." *Hearing Before the Senate Subcomm. on Immigration and Refugee Policy and the House Subcomm. on Immigration, Refugees, and International Law*, 97th Cong., 1st Sess. 14–15 (1981) (statement of William French Smith, Attorney General) [hereinafter cited as *Hearing*]. Although some of the initiatives announced by the President and Attorney General addressed the problem of Haitian immigration—for example, the President's decision to order the Coast Guard to interdict vessels suspected of carrying undocumented aliens on the high seas, Exec. Order No. 12,324 (1981), *reprinted in* 8 U.S.C.A. § 1182 note at 71—none of these policies is at issue in this litigation.

> What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.

Emmerich de Vattel, *The Law of Nations* (1758).

[1] For centuries, it has been an accepted maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty. *Fong Yue Ting v. United States*, 149 U.S. 698, 707–11, 13 S.Ct. 1016, 1019–21, 37 L.Ed. 905 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659, 12 S.Ct. 336, 338, 35 L.Ed. 1146 (1892).[4] Although the Constitution contains no direct mandate relating to immigration matters, the Supreme Court has long recognized that the political branches of the federal government have plenary authority to establish and implement substantive and procedural rules governing the admission of aliens to this country. *Id.; Chae Chan Ping v. United States [The Chinese Exclusion Case]*, 130 U.S. 581, 609, 9 S.Ct. 623, 631, 32 L.Ed. 1068 (1889). It is worth emphasizing that while the Court could have implied the power to regulate immigration from constitutional grants of legislative powers such as the right to declare war, to approve treaties, to regulate foreign commerce, to establish a uniform rule of naturalization, and to enact all necessary and proper laws, the Court instead declared that "the control of immigration [is] an implied power arising out of national sovereignty and existing without regard to any constitutional grant." 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.2a (rev. 1982); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936) ("[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.").[5]

4. Some courts and commentators have argued that since the Supreme Court in *Nishimura Ekiu* sought support for its expansive definition of the exclusion power in traditional international law concepts, subsequent developments in international law should affect the scope of the exclusion power. *See, e.g., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir.1981) (dictum); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum.L.Rev. 957, 969 n. 88 (1982). Amici urge us to adopt that position here and find that the continued detention of the Haitian plaintiffs violates the prohibition against arbitrary and indefinite punishment recognized in a number of international agreements. *See, e.g.*, Universal Declaration of Human Rights, Art. 3 ("everyone has the right to life, liberty, and the security of person") and Art. 9 ("no one shall be subjected to arbitrary arrest, detention or exile"), U.N. Doc. A/801 (1948); The American Convention on Human Rights, Part I, ch. II, Art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."), 77 Dept. of State Bull. 28 (July 4, 1977); *see also Rodriguez-Fernandez*, 654 F.2d at 1388.

The fact that the United States is a signatory to the latter document but not the former does not affect amici's argument, since they do not assert claims founded on any self-executing source of international law, but simply contend that these agreements represent part of the modern background of international law against which the dimensions of the exclusion power must be defined. Customary international law, however, derives not only from individual treaties, but from the "concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time." Hudson, *The Permanent Court of International Justice, 1920–1942* 609 (1943), *quoted in* 1 M. Whiteman, *Digest of International Law* § 6, at 75 (1963). "Arbitrary" is hardly a self-defining term, but amici have pointed to no evidence in the way of diplomatic protests, international arbitrations, or court decisions that suggest that it is current international practice to regard the detention of uninvited aliens seeking admission as a violation of customary international law. We therefore see no reason for concluding that the traditional conceptions of national sovereignty relied on by the Supreme Court in its early decisions in this area have been significantly eroded, and we note that this view is in accord with the Court's own recent pronouncements. *See, e.g., Landon v. Plasencia*, — U.S. —, —, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative.").

5. Because this "undefined and undefinable" sovereign power does not depend on any constitutional grant of authority, there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their

[2, 3] The political branches of the federal government therefore possess concurrent authority over immigration matters. *See Fong Yue Ting*, 149 U.S. at 713, 13 S.Ct. at 1022; *Nishimura Ekiu*, 142 U.S. at 659, 12 S.Ct. at 338. Congress may exercise its implied powers in the immigration field through its legislative powers, while the Executive has two sources of authority in this area: (1) power delegated by Congress through statutes such as the INA and (2) its inherent power, arising out of the Executive's plenary authority over foreign relations. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). Theoretically, the President has an independent source of power concerning immigration policy, at least with regard to matters that are not the subject of either a statutory mandate or an express prohibition.[6] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636–37, 72 S.Ct. 863, 870–71, 96 L.Ed. 1153 (1952) (Jackson, J., concurring); *Olegario v. United States*, 629 F.2d 204, 226 (2d Cir. 1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981). In practice, however, the comprehensive character of the INA vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress. *See, e.g., Knauff*, 338 U.S. at 543, 70 S.Ct. at 312; *Fong Yue Ting*, 149 U.S. at 713, 13 S.Ct. at 1022; *Nishimura Ekiu*, 142 U.S. at 659, 12 S.Ct. at 338; *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir.1982). The courts have instead tended to view the President's inherent powers as a justification for permitting Congress to make remarkably broad delegations of its authority in the immigration field. As Justice Minton explained in *Knauff*, "[n]ormally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power" without raising delegation concerns. 338 U.S. at 543, 70 S.Ct. at 313; *cf. Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965); *Curtiss-Wright*, 299 U.S. at 320, 57 S.Ct. at 221 (when dealing with foreign affairs Congress may delegate a degree of discretion that would not be permissible if domestic policy alone were involved).

[4] The sweeping delegations of congressional authority contained in the INA demonstrate that Congress has taken full advantage of the Supreme Court's invitation. The principal responsibility for immigration matters in the Executive branch resides with the Attorney General, who is the beneficiary of broad grants of discretion under the statute. The most important of these is set forth at 8 U.S.C. § 1103(a), which provides that:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as [power is delegated to other executive officials]. . . .

admissibility. *See, e.g., The Chinese Exclusion Case*, 130 U.S. at 609, 9 S.Ct. at 631; 1 C. Gordon & H. Rosenfield, *supra*, at § 2.2a; *cf. Wong Wing v. United States*, 163 U.S. 228, 237, 16 S.Ct. 977, 980, 41 L.Ed. 140 (1896) (noting that powers of the federal government with regard to aliens are more limited outside the immediate context of regulating entry). Aliens may therefore be denied admission on grounds that would be constitutionally impermissible or suspect in the context of domestic legislation. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (gender and illegitimacy); *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (political beliefs); *Nazareno v. Attorney General*, 512 F.2d 936 (D.C.Cir.) (age), *cert. denied*, 423 U.S. 832, 96 S.Ct. 53, 46 L.Ed.2d 49 (1975); *Dunn v. INS*, 499 F.2d 856 (9th Cir.1974) (national origin), *cert. denied*, 419 U.S. 1106, 95 S.Ct. 776, 42 L.Ed.2d 801 (1975).

6. In the foreign policy area, for example, the Executive's inherent powers have been held to confer authority upon the President to settle the claims of American nationals against a foreign state as part of a diplomatic agreement. *See, e.g., United States v. Pink*, 315 U.S. 203, 229–30, 62 S.Ct. 552, 565–66, 86 L.Ed. 796 (1942); *Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 809–10 (1st Cir.1981).

> He shall establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. . . . He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens. . . .

The INA also provides that "determination and ruling by the Attorney General with respect to all questions of law [under the statute] shall be controlling," *id.*, and it grants the Attorney General the authority to delegate his powers under the INA to employees of the INS or other Justice Department officials. *Id.*[7] Other provisions of the INA grant broad discretionary powers to the Attorney General or his delegate with regard to the parole power, the underlying predicate of this action.[8] The Attorney General "may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States. . . ." *Id.* § 1182(d)(5)(A).

The Attorney General may be permitted the greatest degree of discretion under the INA, but other executive officials also benefit from extremely broad delegations. In the event of war or some other national emergency, the President, upon a finding that additional restrictions beyond those supplied in the statute are necessary, may issue a proclamation making it unlawful "for any alien to depart from or enter . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe. . . ." *Id.* § 1185(a)(1).[9] Section 1182(f) of the INA goes even further. It empowers the President, upon a finding that "the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," to "suspend the entry of all aliens or any class of aliens . . . or to impose on the entry of aliens any restrictions he may deem to be appropriate" for as long as he considers necessary. *Id.* § 1182(f).[10]

[5] Despite these broad grants of authority, executive officials "function as agents of Congress in enforcing the law. . . . If such officers depart from the zone of authority charted in the statute they act illegally and their actions can be corrected in the courts." 1 C. Gordon & H. Rosenfield, *supra*, at § 2.2b; *see also, e.g., Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 335, 53 S.Ct. 167, 170, 77 L.Ed. 341 (1932) (courts may review executive action in immigration field to ensure compliance with grant of statutory authority); *Mahler v. Eby*, 264 U.S. 32, 44, 44 S.Ct. 283, 288, 68 L.Ed. 549 (1924) (warrants of deportation could not issue until executive officials made individualized findings that aliens were undesirable residents); *Gegiow v. Uhl*, 239 U.S. 3, 9, 36 S.Ct. 2, 3, 60 L.Ed. 114 (1915) ("[W]hen the record shows that a commissioner of immigration is exceeding his power, the alien may demand

7. In practice, the Attorney General's authority is delegated to the Commissioner of the INS and to its regional and district directors. 2 K. Davis, *Administrative Law Treatise* § 8:10 (2d ed. 1979).

8. The term "parole" is used by both the INS and the courts to "encompass a variety of situations in which temporary entry or stay in the United States is authorized." 1 C. Gordon & H. Rosenfield, *supra*, § 2.5d. Although the temporary release of aliens seeking asylum is sometimes referred to by the technical term "deferred inspection," this word is synonymous with "parole" and the latter term is used here.

9. This section was cited by President Carter as authority for his action delegating authority to the Secretary of State and Attorney General to apply additional restrictions to the entrance of Iranian aliens during the Hostage Crisis. *See* Exec.Order No. 12,172 (1979), *reprinted in* 8 U.S.C.A. § 1185 note at 103.

10. This section, along with 8 U.S.C. § 1185(a)(1), was cited as authority by President Reagan for his action ordering the Coast Guard to interdict undocumented aliens attempting to enter the southeastern United States from the high seas. *See* Proclamation No. 4865 (1981), *reprinted in* 8 U.S.C.A. § 1182 note at 72; Exec.Ordes. No. 12,324 (1981), *reprinted in* 8 U.S.C.A. § 1182 note at 71.

his release upon habeas corpus.").[11] * In practice, however, the vague and sweeping language employed by Congress in these provisions permits wide flexibility in decision-making on the part of the executive officials involved, and the courts are generally reluctant to interfere. *See Sarbe v. Buston*, 419 U.S. 65, 74, 95 S.Ct. 272, 278, 42 L.Ed.2d 431 (1974); *Knauff*, 338 U.S. at 543-44, 70 S.Ct. at 312-13.

[6] Thus, as a result of the existence of inherent executive power over immigration and the broad delegations of discretionary authority in the INA, the separation-of-powers doctrine places few restrictions on executive officials in dealing with aliens who come to this country in search of admission or asylum. The authority of a companion branch, however, is not the only source of restraint upon executive action. We must also consider whether the Haitian plaintiffs in this case have any rights under the Constitution that can permit them to challenge the Executive's refusal to grant them parole.

B. *The Constitutional Rights of Excludable Aliens*

[7] Any analysis of the constitutional rights of aliens in the immigration context must begin by taking note of the fundamental distinction between the legal status of excludable or unadmitted aliens and aliens who have succeeded in effecting an "entry" into the United States, even if their presence here is completely illegal. The Supreme Court originally indicated that the powers of the political branches with respect to the exclusion and expulsion of aliens are equally broad, *see Fong Yue Ting*, 149 U.S. at 713-14, 13 S.Ct. at 1022, but it soon recognized that "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population" is entitled to due process under the fifth amendment and cannot be deported "without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States." *Kaoru Yamataya v. Fisher [The Japanese Immigrant Case]*, 189 U.S. 86, 101, 23 S.Ct. 611, 615, 47 L.Ed. 721 (1903).[12]

11. We realize that the Court's statement in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S.Ct. 309, 312-13, 94 L.Ed. 317 (1950), that "It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien," has been read by some commentators to cast doubt upon the continuing validity of these precedents. *See, e.g.*, Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv.L.Rev. 1362 (1953), *reprinted in* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *The Federal Courts and the Federal System* 351-52 & nn. 39-40 (2d ed. 1973). We note, however, that Justice Minton made this comment in the context of discussing executive action that was pursuant to the terms of a congressional delegation. Thus, his statement that judicial review of the merits of an executive decision is barred when the Executive has acted in accordance with the scope of its delegated powers does not necessarily conflict with the teaching of the earlier precedents that the judiciary can enforce executive compliance with statutory and regulatory limitations on its discretion. The Court's repeated statements that decisions by the political branches in the immigration area are "largely immune from judicial control," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953) (emphasis added), or are "subject only to narrow judicial review," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n. 21, 96 S.Ct. 1895, 1904 n. 21, 48 L.Ed.2d 495 (1976) (emphasis added), clearly do not altogether preclude judicial scrutiny, and this principle applies to executive as well as congressional action. *See Mathews v. Diaz*, 426 U.S. 67, 82, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976) (narrow standard of judicial review applies to decisions "made by the Congress *or the President* in the area of immigration") (emphasis added).

12. Even in the deportation context, however, the Court was willing to recognize only limited rights for the alien. It held that a trial or other formal judicial hearing was not required; an administrative proceeding was satisfactory. 189 U.S. at 101, 23 S.Ct. at 614. The Court also found that the hearing provided in that case was adequate, even though "[i]t is true that [the alien] pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a 'pretended' one; and that she did not, at the time, know that the investigation had reference to her being deported from the country." *Id.* at 101-02, 23 S.Ct. at 615. Justice Harlan nevertheless concluded that "[t]hese considerations cannot justify the intervention of the courts." *Id.* at 102, 23 S.Ct. at 615.

While resident aliens, regardless of their legal status, are therefore entitled to at least limited due process rights, aliens "who have never been naturalized, nor acquired any domicile of residence within the United States, nor even been admitted into the country pursuant to law" stand in a very different posture: "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." *Nishimura Ekiu*, 142 U.S. at 660, 12 S.Ct. at 339.

In the eighty years since the Court first recognized this distinction between the rights of excludable and deportable aliens, it has become ergrained in our law. Thus, in *Leng May Ma v. Barber*, 357 U.S. 185, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958), the court emphasized that

> our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission ... and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."

Id. at 187, 78 S.Ct. at 1073 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956 (1953)); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 600, 73 S.Ct. 472, 479, 97 L.Ed. 576 (1953) ("'excludable' aliens ... are not within the protection of the Fifth Amendment"); *Bridges v. Wixon*, 326 U.S. 135, 161, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103 (1945) (Murphy, J., concurring) ("The Bill of Rights is a futile authority for an alien seeking admission for the first time to these shores."). This principle was reiterated by the Court last Term in *Landon v. Plasencia*, — U.S. —, —, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982), in which Justice O'Connor noted that

> an alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.... [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.

Aliens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress. The INA does in fact contain a number of provisions that collectively guarantee at least limited due process protection for excludable aliens. Under 8 U.S.C. § 1226(a), an alien seeking entry is entitled to a hearing on the validity of his application for admission before an immigration judge. At the hearing the alien is permitted the assistance of counsel, *id.* § 1362, and has the right to present evidence in his own behalf, to examine and object to evidence against him, and to cross-examine witnesses presented by the government. 8 C.F.R. § 236.2(a). If the immigration judge determines that the alien is not entitled to admission, this decision may be appealed to the Board of Immigration Appeals (BIA). 8 U.S.C. § 1226(b); 8 C.F.R. § 236.7. An alien may also challenge a final order of exclusion in the federal courts by filing a petition for a writ of habeas corpus. 8 U.S.C. § 1105a(b).

The process of determining the merits of an alien's application for admission is frequently a lengthy one, particularly when the alien is able to hire a skilled immigration lawyer. *Louis III*, 544 F.Supp. at 978. Because the carriers that bring aliens seeking admission to this country can rarely afford to wait until this process is concluded, Congress recognized that it was necessary to permit aliens to make a temporary, unofficial entry into the United States pending the resolution of their applications. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215, 73 S.Ct. 625, 631, 97 L.Ed. 956 (1953); 8 U.S.C. § 1223(a) (removal of alien from vessel or aircraft for examination by immigration officials "shall not be considered a landing"); *id.* § 1225(b) (alien who does not appear to examining

immigration officer to be "clearly and beyond a doubt entitled to land" may be detained for further inquiry); *id.* § 1182(d)(5)(A) (granting authority to the Attorney General to parole aliens seeking admission into the United States, but providing that "such parole of such alien shall not be regarded as an admission of the alien").

The Supreme Court has consistently rejected claims that the parole or detention of an excludable alien has any effect on his status under the law. Thus, in *Leng May Ma*, Justice Clark noted that "[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." 357 U.S. at 188, 78 S.Ct. at 1074. Likewise, he explained that "[t]he parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status...." *Id.* at 190, 78 S.Ct. at 1075; *see also Mezei*, 345 U.S. at 215, 73 S.Ct. at 631 (alien permitted to enter pending a decision on admissibility "is treated as if stopped at the border"); *Kaplan v. Tod*, 267 U.S. 228, 230–31, 45 S.Ct. 257, 257–58, 69 L.Ed. 585 (1925); *United States v. Ju Toy*, 198 U.S. 253, 263, 25 S.Ct. 644, 646, 49 L.Ed. 1040 (1905); *Nishimura Ekiu*, 142 U.S. at 661, 12 S.Ct. at 339. This principle—the "entry doctrine" fiction—has been recognized as well by the fifth circuit. *Ahrens v. Rojas*, 292 F.2d 406, 410–11 (5th Cir.1961).

[8] There is no question that the Haitian plaintiffs in this case are excludable aliens and have not been formally admitted into the United States. *Louis III*, 544 F.Supp. at 998. Since an alien's legal status is not altered by detention or parole under the entry doctrine fiction, it seems clear that plaintiffs here can claim no greater rights or privileges under our laws than any other group of aliens who have been stopped at the border. The district court, however, concluded that the entry doctrine and the precedents cited above were inapplicable because the Haitian plaintiffs here are challenging their continued incarceration *pending* a determination of admissibility, rather than seeking to compel the government to grant them admission in a legal sense. *Louis III*, 544 F.Supp. at 998. Likewise, the panel distinguished *Mezei* and other immigration decisions on the grounds that those cases concerned "immigration procedures" rather than "the discretionary exercise of the Executive's parole power." *Jean*, 711 F.2d at 1484–85. The panel also considered the entry doctrine inapplicable because "its purpose [is] to limit the procedural rights of an excludable alien 'regarding his application' for admission," *id.* at 1484 (quoting *Plasencia*, — U.S. at —, 103 S.Ct. at 329), and therefore concluded that the Haitian plaintiffs had equal protection rights on the basis of their physical presence within the territorial limits of the United States. *See id.* 1484–85.[12]

[9] Although the distinction between parole and admission drawn by the panel and the district court is not an implausible one, we conclude that it cannot be reconciled with the Supreme Court's jurisprudence in this area. In particular, we believe that the Court's decision in *Mezei* is controlling on this issue and that a close examination of the facts at issue in *Mezei* forecloses us from relying on the arguments

12. Appellees, quoting *Leng May Ma*, 357 U.S. at 187, 78 S.Ct. at 1073, also contend that the entry doctrine is not controlling because it "is not of constitutional origin. It 'is wholly one of statutory construction.'" This argument is disingenuous. The *Leng May Ma* court did not say that the entry doctrine itself is applicable only to matters of statutory construction; it said that the question in the particular case before it—which turned on the meaning of the phrase "within the United States" under the old wording of 8 U.S.C. § 1253(h), providing for discretionary relief from deportation—was one of statutory construction. The Supreme Court has in fact applied the entry doctrine in a number of cases in which the plaintiff's claim turned wholly on an alleged deprivation of liberty in violation of the fifth amendment. *See Mezei*, 345 U.S. at 209, 213, 73 S.Ct. at 627, 629; *Ju Toy*, 198 U.S. at 263, 25 S.Ct. at 646; *Nishimura Ekiu*, 142 U.S. at 664, 12 S.Ct. at 340.

that the panel and the district court found persuasive. Thus, we cannot accept appellees' argument that *Mezei* is not on point because "the alien was challenging non-admissibility, not incarceration." The gravamen of Mezei's complaint was clearly not the government's right to exclude him—a permanent exclusion order had already been entered in his case, and he did not contest it in his habeas petition—but the power of the government to continue to detain him without a hearing pending his deportation. *See Mezei*, 345 U.S. at 207, 73 S.Ct. at 627. Justice Clark stated explicitly in his majority opinion that "[t]he issue is whether the Attorney General's continued exclusion of respondent without a hearing *amounts to an unlawful detention*, so that courts may admit him *temporarily* to the United States on bond until arrangements are made for his departure abroad." *Id.* (emphasis added).

Mezei thus did not concern admission or exclusion *per se*, but the rights of an alien when challenging his continued detention pending the enforcement of an exclusion order that has been entered against him. Since the Supreme Court applied the entry doctrine fiction under these circumstances, *see id.* at 215, 73 S.Ct. at 631, squarely rejecting the territorial argument advanced by the second circuit majority,[14] the doctrine's applicability clearly is not limited to challenges relating to the admission decision itself.[15] *See also Pierre v. United States*, 547 F.2d 1281, 1283, 1289–90 (5th Cir.) (entry doctrine fiction applied to aliens seeking parole pending decision on petition for asylum), *vacated and remanded to consider mootness*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977); *Ahrens v. Rojas*, 292 F.2d at 408–11 (entry doctrine bars excludable alien from claiming fifth amendment right to a hearing on the revocation of his parole). We therefore conclude that *Mezei* compels us to hold that the Haitian plaintiffs in this case cannot claim equal protection rights under the fifth amendment, even with regard to challenging the Executive's exercise of its parole discretion.[16]

14. The second circuit majority, like the panel and the district court here, reasoned on the basis of *Yick Wo v. Hopkins* that the fifth amendment "is not confined to the protection of citizens.... [Its guarantees] extend in fact to all whose presence here brings them within reach of the judicial and administrative processes of the United States Government." *United States ex rel. Mezei v. Shaughnessy*, 195 F.2d 964, 967 (2d Cir.1952), *rev'd*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). Because Mezei's temporary refuge on Ellis Island was within the territorial limits of the United States, the second circuit concluded that he could claim rights under the fifth amendment with regard to his request for temporary admission on bond. As we have seen, the Supreme Court subsequently rejected this reasoning, which is virtually identical to the argument presented by appellees here.

15. Although the panel quotes *Landon v. Plasencia* in support of its contention that the entry doctrine fiction applies only to the admission decision, *see Jean*, 711 F.2d at 1481, a reading of the entire case does not support this view. Plaintiff in *Plasencia* was a resident alien who left the country for a few days and was stopped at the border while seeking to smuggle illegal aliens on her return. — U.S. at —, 103 S.Ct. at 324. The Supreme Court ruled that plaintiff was entitled only to an exclusion proceeding, not a deportation hearing, but nonetheless permitted her to claim limited due process rights. *Id.* at —, 103 S.Ct. at 329–30. *Plasencia* is therefore similar to *Kwong Hai Chew*, where the Court found that a resident alien who had spent several months abroad as a seaman on an American-flag vessel had not departed the country in a legal sense. 344 U.S. at 600, 73 S.Ct. at 479. The Court never mentions the entry doctrine in *Plasencia*; its opinion "is ambiguous regarding whether the alien was within or without the territory of United States.... [The Court] neither relied on [the territoriality] rationale nor even addressed the issue of physical presence." *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 Harv.L.Rev. 1286, 1321 n. 48 (1983) [hereinafter cited as *Developments*]. Thus, if *Plasencia* implicated any legal fiction, it is an "exit doctrine" under which resident aliens may physically leave the country without departing in a legal sense, rather than the entry doctrine, which is generally applied to excludable aliens.

16. In addition to the arguments discussed above, appellees offer a variety of other reasons for distinguishing *Mezei* from this case—that *Mezei* involved national security considerations, that it was not an asylum case, that it did not involve discrimination on the basis of national origin, and that the Attorney General at the time had no statutory authority to parole aliens. We find these distinctions no more persuasive than the other arguments advanced

We realize, of course, that *Mezei*—like its predecessor, *Knauff*—has been heavily criticized by academic commentators,[17] As an intermediate appellate court, however, we cannot properly question the continued authority of this Supreme Court precedent—a precedent that the Court cited without reconsideration as recently as last Term. *See Plasencia*, —— U.S. at ——, 103 S.Ct. at 329. With regard to the key issue here—whether the grant or denial of parole is an integral part of the admissions process—*Mezei* is fully in accord with other, less controversial precedents. As far back as 1896 the Supreme Court approved the validity of detention

> as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens.... Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.

Wong Wing v. United States, 163 U.S. 228, 235, 16 S.Ct. 977, 980, 41 L.Ed. 140 (1896); *see also Carlson v. Landon*, 342 U.S. 524, 538, 72 S.Ct. 525, 533, 96 L.Ed. 547 (1952) ("Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").[18]

[10–12] These decisions reflect policy imperatives and fundamental principles of national sovereignty that cannot be easily dismissed, regardless of the individual merits of the Court's decisions in *Knauff* and *Mezei*.[19] The reason that Congress has passed legislation regulating the admission of aliens is its concern about how their entry will affect the economic, political, and social well-being of this nation. The grant of parole is subject to certain restrictions and is theoretically of a short-term character,[20] but it does permit the physical entry

by appellees. Any broad conception of "national security" must surely include the ability to regulate entry into a country, and the Supreme Court has made it clear that the standard of review in immigration cases is not affected by "the nature of the policy choice at issue." *Fiallo*, 430 U.S. at 796, 97 S.Ct. at 1480. Similarly, the character of parole is essentially the same regardless of the ultimate claim the alien has raised, *see* 1 C. Gordon & H. Rosenfield, *supra*, at § 2.54, so the fact that Mezei was not seeking asylum is also not significant. The important point is that, like petitioners in this case, he was seeking temporary admission into the United States. Although there are obviously some factual differences between the two cases, the similarity between the nature of the claims presented and the legal status of the plaintiffs is sufficient to conclude that *Mezei* is controlling.

17. *See, e.g.*, 2 K. Davis, *supra* note 7, § 11:5 ("The holding that a human being may be incarcerated for life without opportunity to be heard on charges he denies is widely considered to be one of the most shocking decisions the Court has ever rendered."); *Developments*, *supra* note 15, 96 Harv.L.Rev. at 1322–24.

18. Although appellees raise a variety of arguments in an effort to distinguish *Carlson*, the point made by the passage quoted above is a matter of simple common sense that clearly does not depend on the precise statutory predicate involved. While the harm feared from the aliens taken into custody under the Internal Security Act in *Carlson* may be of a different character from that feared in this case, the essential point remains the same—that if aliens can claim that they have a constitutional right to due process regarding temporary release pending a final determination in their cases, the government's ability to control "entry" into this country is severely eroded.

19. It is worth pointing out in this context that much of the criticism of *Mezei* and *Knauff* has focussed on the fact that the aliens who were ordered excluded without a hearing in those cases had strong personal or family ties to the United States. *See Mezei*, 345 U.S. at 216–17, 73 S.Ct. at 631–32 (Black, J., dissenting); *Knauff*, 338 U.S. at 539, 70 S.Ct. at 310. Most excludable aliens have far weaker claims to enjoying the benefits of admission into this country, however, and the harsh results of *Knauff* and *Mezei* should not obscure the compelling policy justifications that support the entry doctrine fiction and the general principle that excludable aliens have no rights with regard to their applications for admission or parole.

20. The reality can be quite different. The grant of parole authority to the Attorney General under 8 U.S.C. § 1182(d)(5)(A) places no time limitation on parole; moreover, an alien with a skilled attorney can delay the exclusion process for years, and aliens who choose to abscond face only a minimal risk of apprehension.

of the alien into the midst of our society and implicates many of the same considerations—such as employment and national security concerns—that justify restrictions on admission. Parole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air. Judge Learned Hand emphasized this point in his dissent to the second circuit's decision in *Mezei*, stating:

> I do not believe that an alien so situated can force us to admit him at all. Suppose . . . that the respondent had refused to let him leave the ship. I do not see what legal process Mezei could have invoked to get ashore before she left; nor do I see what theory supports the claim that, because we did not impose upon him this harsher alternative, but *ex gratia*, allowed him to land until his case was decided, we must grant him even a limited version of that entry which the statute denies him. For we must remember that the order [releasing Mezei upon bond] does give him a privilege of entry.... Moreover, although that privilege is hedged about in various ways, he will be able nevertheless to mingle with the mass of citizens....

United States ex rel. Mezei v. Shaughnessy, 195 F.2d 964, 970–71 (L. Hand, J., dissenting) (1952). We follow Judge Hand and the Supreme Court in concluding that since the immediate implications of parole and legal admission are identical in a number of important respects, excludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right.

[13] Of course, there are certain circumstances under which even excludable aliens are accorded rights under the Constitution. Appellees seize on these exceptions as a basis for denying the validity of the entry doctrine fiction entirely, asserting that "[t]he critical factor in determining whether the Fifth Amendment applies is not the citizenship or immigration status of the person, but the mere fact of government action.... [T]he Constitution limits the power of government whenever, wherever, and upon whomever the government acts." If this view were correct, all aliens in all circumstances would presumably be entitled to the full range of constitutional protections. This is clearly not the case. Instead, the courts have made it plain that the degree of constitutional protection accorded an alien in a particular situation is to be determined by such factors as the legal status of the alien and the context of the government action he seeks to challenge. For example, those with the status of deportable aliens are constitutionally entitled to rights in the deportation context that are inapplicable to exclusion proceedings. Illegal or resident aliens may also claim other rights under the fifth and fourteenth amendments. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).[21]

The courts have also recognized that aliens can raise constitutional challenges to deprivations of liberty or property outside the context of entry or admission, when the plenary authority of the political branches is not implicated. Aliens seized by United States officials for suspected involvement in criminal activity are entitled to the same constitutional rights that normally apply in such proceedings. *See, e.g., Wong Wing*, 163 U.S. at 238, 16 S.Ct. at 981 ("[A]liens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without

21. These cases, as well as *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896), were cited by appellees in support of their argument that excludable aliens have rights under the fifth amendment. In fact, each concerned resident aliens.

due process of law.");[22] *United States v. Henry*, 604 F.2d 908, 914 (5th Cir.1979) ("[A]n alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior, in a proper case and at the proper time, is entitled to those protections guaranteed by the Fifth Amendment in criminal proceedings which would include the *Miranda* warning."). The courts have further ruled that aliens who are the victims of unconstitutional government action abroad are protected by the Bill of Rights if the government seeks to exploit fruits of its unlawful conduct in a criminal proceeding in the United States. *United States v. Demanett*, 629 F.2d 862, 866 (3d Cir.), *cert. denied*, 450 U.S. 910, 101 S.Ct. 1347, 67 L.Ed.2d 333 (1980); *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir.1974); *cf. United States v. Tiede*, 86 F.R.D. 227, 242–44 (U.S. Ct. for Berlin 1979) (protections of Bill of Rights apply to friendly aliens in the American sector of West Berlin). The Supreme Court has also recognized that even non-resident aliens are entitled to the protection of the fifth amendment's prohibition on unlawful takings. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489, 491–92, 51 S.Ct. 229, 232, 75 L.Ed. 473 (1931).

These authorities, however, do not mandate the conclusion that excludable aliens such as the Haitian plaintiffs can claim equal protection rights under the fifth amendment with regard to parole. *Russian Volunteer Fleet* can be distinguished because it clearly does not implicate in any way the powers of the national government over immigration. When the government seizes the property of foreign nationals within this country, its actions do not fall within a sphere of plenary executive and legislative authority, and it therefore cannot claim that the aliens involved are entitled only to the degree of due process that Congress is prepared to extend them as a matter of grace.

Similar considerations apply in the context of criminal prosecutions. When the government subjects an alien to the criminal process it is plainly no longer seeking to effectuate its power to control admission into the United States by removing the alien from this country. The arrests of the aliens in *Wong Wing* and *Henry* may have grown out of the Executive's efforts to control the entry of foreigners into the United States,[23] but the decision by government officials to subject them to criminal prosecution or punishment, rather than deportation, completely changed the nature of the proceedings. From that point forward any action taken by the government derived not from its power to control admission into this country, but from the powers of the Executive over law enforcement. The government's actions in prosecuting Henry and imprisoning Wong Wing therefore fell outside the plenary power to control immigration that justifies the extraordinary executive and congressional latitude in that area. This critical distinction was emphasized by the Court in *Wong Wing*:

> No limits can be put by the courts upon the power of congress to protect, *by summary methods*, the country from the advent of aliens.... But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made

22. Although *Wong Wing* could be distinguished on the grounds that it involved resident aliens, it was decided before *The Japanese Immigrant Case* distinguished between the degree of legal protection enjoyed by deportable and excludable aliens and therefore speaks in terms of general applicability. *See* 163 U.S. at 237, 16 S.Ct. at 980; *Developments*, *supra* note 15, 96 Harv.L.Rev. at 1316 n. 20. We believe that its basic principle—that criminal punishment may not be imposed without due process protections—is relevant to excludable aliens and see no reason to reconsider this court's decision in *United States v. Henry*, 604 F.2d 908 (5th Cir. 1979).

23. The aliens in *Wong Wing* were imprisoned under a statute that made illegal residence within the United States by Chinese aliens a crime. 163 U.S. at 233–34, 16 S.Ct. at 979–80. In *Henry* the alien was charged with falsely representing himself to be an American citizen. 604 F.2d at 910.

that the fact of guilt should first be established by a judicial trial.

163 U.S. at 237, 16 S.Ct. at 981 (emphasis added). Similarly, the fifth circuit in *Henry* stressed that the excludable alien in that case "was entitled to the rights guaranteed by the Fifth Amendment, including the *Miranda* warning, *only* when the questioning of the immigration officials became an interrogation that was custodial in nature in which information was sought for the purpose of using it against him in a criminal proceeding." 604 F.2d at 914 (emphasis added).

These holdings reflect the Supreme Court's recognition of a significant distinction between the degree of due process protection implicated by statutory provisions that "contemplate only the exclusion or expulsion of [aliens] and those which provide for their imprisonment at hard labor, pending which their deportation is suspended." *Wong Wing*, 163 U.S. at 236, 16 S.Ct. at 980. This principle is also reflected in Supreme Court decisions holding that the full panoply of due process rights is not applicable in deportation proceedings because they are not criminal in character. *See, e.g., Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954); *Fong Yue Ting*, 149 U.S. at 730, 13 S.Ct. at 1028.[24]

Some courts and commentators have suggested that when an exercise of the government's power to exclude results in an indefinite detention of an excludable alien, at some point the continued imprisonment becomes punishment, regardless of the legal justifications or fictions involved. These authorities contend that at this juncture the government should be required to make some justification to continue to detain the alien. *See, e.g., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981); *Soroa-Gonzalez v. Civiletti*, 515 F.Supp. 1049, 1056 n. 6 (N.D.Ga.1981); *Fernandez-Roque v. Smith*, 91 F.R.D. 239, 243 (N.D.Ga.1981), *appeal dismissed*, 671 F.2d 426 (11th Cir.1982); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum.L.Rev. 957, 980 (1982); Note, *The Constitutional Rights of Excluded Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees*, 70 Geo.L.J. 1303, 1306 (1982). In *Rodriguez-Fernandez*, for example, the tenth circuit ruled that detention of excludable aliens "is permissible during proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return to the country of origin...." After that time, the alien is entitled to release unless the government can demonstrate "that the detention is still temporary pending expulsion, and not simply incarceration as an alternative to departure." 654 F.2d at 1389–90.[25]

We could distinguish *Rodriguez-Fernandez* from this case on the grounds that the former involved an alien against whom an exclusion order had already been entered and who was clearly unable to return to his country of origin.[26] Indeed, the tenth circuit placed no time limits on the government's ability to detain excludable aliens pending the admission decision. *Id.* at 1389. Nevertheless, we detect two significant problems that prevent us from endorsing the tenth circuit's reasoning. The first—which is controlling from our point of

24. For example, aliens may be arrested without a warrant for deportation, *Abel v. United States*, 362 U.S. 217, 233–34, 80 S.Ct. 683, 694–95, 4 L.Ed.2d 668 (1960), and may be deported for illegal behavior that occurred before Congress outlawed it since deportation is not considered "punishment" under the ex post facto clause of the Constitution, *see Harisiades v. Shaughnessy*, 342 U.S. 580, 594–95, 72 S.Ct. 512, 521–22, 96 L.Ed. 586 (1952).

25. *Cf. Fernandez-Roque*, 91 F.R.D. at 243 (pending exclusion hearings, the continued detention of aliens who are not likely to be returned to their country of origin, who have committed no crimes in the United States, who are not a threat to national security or the public interest, and who were invited to this country by the President, "constitutes an abuse of discretion of the parole authority").

26. Haiti has indicated that it is willing to accept the return of these aliens. *Hearing, supra* note 3, at 11. Although plaintiffs contend that they fear prosecution if they return to Haiti, its government has denied that they would be subject to any reprisals.

view—is that it cannot be reconciled with the Supreme Court', decision in *Mezei*, which held that an excludable alien could not challenge his continued detention without a hearing. The second difficulty is that if the prospect of indefinite detention is held to be sufficient to require the government to meet some judicially-imposed standard to continue to detain an alien, the plenary authority of the political branches in the exclusion area is largely rendered nugatory. The prospect of indefinite confinement, after all, can be raised by the refusal of an excludable alien to return home, or the refusal of his country of origin or any other country to accept him.

This is the critical flaw with the second circuit's decision in *Mezei* and the tenth circuit's decision in *Rodrigues-Fernandez*, each of which based the alien's right to challenge his continued confinement on whether or not he had a foreseeable chance of being able to go elsewhere. At first glance, this is an attractive solution. It seems both humane and eminently realistic, because it does not turn on legal fictions and distinctions that appear to lack practical substance. Unfortunately, this approach would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back. In the probable absence of any reliable information about such aliens beyond what they cared to provide, could the government meet its burden under some judicially-imposed standard of showing that indefinite detention was justified? It seems unlikely.

Mindful of the Supreme Court's warning that "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution," *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976), we conclude that we must resist the temptation to tamper with the authority of the Executive by ruling that excludable aliens have constitutional rights in this area, even with regard to their applications for parole.

C. *Judicial Review of Executive Discretion*

Although we hold that the Haitian plaintiffs cannot challenge the refusal of executive officials to parole them on the basis of the fifth amendment's equal protection guarantee, this is not the end of our inquiry. That the authority of the political branches in this area is plenary does not mean that it is wholly immune from judicial review. As two leading commentators have noted, the Executive's discretionary authority concerning parole decisions "is broad, but not unlimited. It may be subjected to judicial scrutiny on a charge that discretion was arbitrarily exercised or withheld." 1 C. Gordon & H. Rosenfield, *supra*, at § 2.54. This principle has been recognized by our colleagues on the second and fourth circuits, who have held that an executive official's decision to deny parole to an unadmitted alien may be subject to judicial review for abuse of discretion. *Bertrand v. Sava*, 684 F.2d 204, 210 (2d Cir.1982); *Palma v. Verdeyen*, 676 F.2d 100, 105 (4th Cir.1982); *see also Pierre*, 547 F.2d at 1289.

Bertrand in particular presents a fact situation highly similar to that at issue in this case. The Haitian plaintiffs in *Bertrand* alleged that the INS district director discriminated against them in the exercise of his parole authority, and contended that his action constituted an abuse of discretion since he did not claim to act pursuant to any national policy adopted by the political branches of the federal government. The second circuit concluded that it did have the authority to review the decisions of the district director, reasoning that:

> Discretion vested by statute in agents of the federal government is rarely, if ever, entirely free from judicial review for abuse. The principle that discretionary power is not absolute power is fundamental to our constitutional form of government. The discretionary power to parole unadmitted aliens granted by statute to the Attorney General, and delegat-

ed by him to INS District Directors, is broad, but it is not without limits.

684 F.2d at 210.

[14] The district court below reached a similar destination by a different route, suggesting that "[p]laintiffs are persons within the territorial jurisdiction of the United States and they cannot be denied their liberty without due process of law." *Louis III*, 544 F.Supp. at 990. We have rejected the argument that the entry doctrine fiction is inapplicable in the context of parole decisions, so we conclude that the district court erred to the extent that it based its jurisdiction to review these determinations on constitutional grounds. The basis for jurisdiction here must be found elsewhere, in the principle that agencies must respect the statutory limits on their discretion, *see, e.g., Lloyd Sabaudo*, 287 U.S. at 335, 53 S.Ct. at 170; *Mahler*, 264 U.S. at 44, 44 S.Ct. at 288; *Gegiow*, 239 U.S. at 9, 36 S.Ct. at 3; *see also supra* note 11, and in the recognition that "agency deviation from its own regulations and procedures may justify judicial relief in a case otherwise properly before the court." *Haitian Refugee Center v. Smith [HRC]*, 676 F.2d 1023, 1041 n. 48 (5th Cir. Unit B 1982);[27] *see also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S.Ct. 499, 503, 98 L.Ed. 681 (1954).

[15] The discretionary decisions of executive officials in the immigration area are therefore subject to judicial review, but the scope of that review is extremely limited. The Supreme Court has repeatedly emphasized that "the power over aliens is of a political character and therefore subject only to narrow judicial review." *Mow Sun Wong*, 426 U.S. at 101 n. 21, 96 S.Ct. at 1904 n. 21; *see also Fiallo v. Bell*, 430 U.S. 787, 793 n. 5, 97 S.Ct. 1473, 1478 n. 5, 52 L.Ed.2d 50 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution.... with respect to the power of Congress to regulate the admission and exclusion of aliens...."). Because the political branches share concurrent authority over immigration matters, it follows that both executive and congressional actions are to be regulated by the judiciary according to the same narrow standard of review. *See Mathews v. Diaz*, 426 U.S. at 81–82, 96 S.Ct. at 1892–1893 ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by Congress *or the President* in the area of immigration....") (emphasis added); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952) (immigration matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference") (emphasis added).

The Supreme Court's ruling in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) underlines the judiciary's limited role in reviewing the discretionary decisions of executive officials in

27. The district court's conclusion that petitioners here could claim rights under the fifth amendment was at least partially based on this court's decision in *HRC v. Smith*, in which the court stated that "[w]e therefore find sufficient legal warrant under the fifth amendment for ... requiring the government to submit a procedurally fair plan for the orderly reprocessing of the plaintiffs' asylum applications." 676 F.2d at 1041. The *HRC* panel also stated, however, that "we conclude that the district court properly exercised its jurisdiction under 8 U.S.C. § 1329 to order the government to submit a reprocessing plan which adheres to INS regulations and operating procedures," regardless of "[w]hether or not these procedures are mandated by the due process guarantee." *Id.* at 1041 n. 48. The *HRC* panel's decision turned on its finding that although "Congress and the executive have created ... a constitutionally protected right to petition our government for political asylum," *id.* at 1038, INS officials attempting to cope with a backload of cases had deliberately "created conditions which negated the possibility that a Haitian's asylum hearing would be meaningful in either its timing or nature. Under such circumstances, the right to petition for political asylum was effectively denied." *Id.* at 1040. *HRC v. Smith* therefore falls into the category of those cases in which judicial relief is mandated by "agency deviation from its own regulations and procedures," *id.* at 1041 n. 48, and the court's finding that the agency had acted in violation of its statutory obligations was a sufficient basis for the court's holding. To the extent that *HRC* may be read to conflict with our decision in this case, the applicable language in *HRC* is disapproved.

the immigration field. In that case the Court considered a challenge to the Attorney General's refusal to grant a waiver permitting a foreign Marxist to visit the United States on a lecture tour. Although the first amendment rights of American citizens were implicated by the Attorney General's decision, the Court held that "when the Executive exercises this [delegated] power negatively on the basis of a *facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770, 92 S.Ct. at 2585 (emphasis added). Similarly, the second circuit stressed in *Bertrand* that

> as long as the Attorney General exercises his broad discretion under 8 U.S.C. § 1182(d)(5) to determine whether unadmitted aliens may be paroled pending final determination of their applications for admission to the United States, his decision may not be challenged on the grounds that the discretion was not exercised fairly in the view of a reviewing court or that it gave too much weight to certain factors relevant to the risk of abscondence and too little to others.

684 F.2d at 212.[28]

[16, 17] Thus, under the approach taken by the Supreme Court in *Kleindienst v. Mandel* and adopted by the second circuit in *Bertrand*, the critical question a court must answer when reviewing an alien's challenge to the denial of his request for parole is whether the immigration officials involved were acting within the scope of their delegated powers. As we noted in section II.A. above, Congress has delegated remarkably broad discretion to executive officials under the INA, and these grants of statutory authority are particularly sweeping in the context of parole. In exercising his parole discretion, the Attorney General is simply instructed that he "may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission ..." 8 U.S.C. § 1182(d)(5)(A). Logically, of course, "the obverse of the grant of discretionary authority in § 1182(d)(5) to parole an excluded alien is a grant of authority to deny parole." *Palma*, 676 F.2d at 104. This grant can certainly be inferred from 8 U.S.C. § 1225(b), which provides that immigration officials shall detain "[e]very alien ... who may not appear ... to be clearly and beyond a doubt entitled to land", and 8 U.S.C. § 1227(a), which permits the Attorney General to continue to detain an excluded alien if he concludes that "immediate deportation is not practicable or proper."[29] In view of these provisions, immigration officials clearly have the authority to deny parole to unadmitted aliens if they can advance "a facially legitimate and bona fide reason" for doing so.

28. Appellees contend that the present case involves no national security or foreign policy considerations and therefore assert that the actions of executive officials here warrant more searching judicial scrutiny than has been applied in other immigration cases in the past. In *Fiallo v. Bell*, however, the Court squarely rejected a similar attempt to distinguish prior decisions in the immigration field as relating to national security or foreign policy matters, stating that "[w]e find no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue." 430 U.S. at 796, 97 S.Ct. at 1480. In addition, the Supreme Court has long recognized that the exclusion process is intimately related to considerations of both national security and foreign policy. *See, e.g., Harisiades*, 342 U.S. at 588–89, 72 S.Ct. at 519 ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations ..."); *The Chinese Exclusion Case*, 130 U.S. at 606, 9 S.Ct. at 630 (noting that threats to national security can come both "from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us"). We therefore see no reason for concluding that the traditional justifications for recognizing wide latitude for executive decisionmaking in this field are inapplicable here.

29. No time limit is put upon the Attorney General's authority to detain an alien under § 1227(a). In contrast, § 1252(c) limits detention of a *resident* alien subsequent to the entry of a final order of deportation to six months.

[18, 19] The Haitian plaintiffs contend that such a reason was lacking in this case, submitting that they were the victims of national origin discrimination. Plaintiffs and the district court both stressed that the challenged actions here were those of executive officials rather than Congress, apparently believing that the Executive is clearly prohibited from adopting policies on its own motion that discriminate on the basis of national origin in the immigration field while Congress is just as clearly permitted to do so. Because the government has contended throughout this case that its new detention policy does not discriminate on the basis of national origin, resolution of this question is not essential to our holding; however, we believe that responsible executive officials such as the President or Attorney General possess this authority under the INA.[38] Nevertheless, since the discretion of lower-level immigration officials is circumscribed not only by legislative enactments but also by the instructions of their superiors in the executive branch, our conclusion that the Executive's policy is consistent with the power delegated by Congress does not end the process of judicial inquiry here. The district court must still determine whether the actions of lower-level officials in the field conform to the policy statements of their superiors in Washington. For as the second circuit correctly noted in *Bertrand:*

> [T]he constitutional authority of the political branches of the federal government to adopt immigration policies based on criteria that are not acceptable elsewhere in our public life would not permit an immigration official, in the absence of such policies, to "apply neutral regulations to discriminate on [the basis of race and national origin]."

684 F.2d at 212 n. 12 (quoting *Vigile v. Sava*, 535 F.Supp. 1002, 1016 (S.D.N.Y. 1982)).

The district court on remand should conduct such proceedings as are necessary to determine whether there exists a facially legitimate and bona fide reason for the government's decision to deny parole to the class members presently in detention, remembering that it is not the court's proper role "to disregard the [stated criteria employed] or to substitute its own policy preferences for those of the official vested by law with discretionary authority to act on requests for parole." *Id.* at 217. The district court should consider (1) whether local immigration officials in fact exercised their discretion under § 1182(d)(5)(A) to make individualized determinations and (2) whether the criteria employed in making those determinations were consistent with

38. In view of the Supreme Court's repeated emphasis on the concurrent nature of executive and legislative power in this area and the sweeping congressional delegations of discretionary authority to the Executive under the INA, there is little question that the Executive has the power to draw distinctions among aliens on the basis of nationality. This issue was squarely presented to the D.C. Circuit in *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir.1979), *cert. denied*, 446 U.S. 967, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980), in which the court upheld a regulation requiring nonimmigrant alien post-secondary school students of Iranian citizenship or birth to provide information to the INS concerning their residence and academic status. The court held that the challenged regulation was within the Attorney General's authority under 8 U.S.C. § 1103(a), which permits the Attorney General to "perform such other acts as he deems necessary" for carrying out his responsibility to administer and enforce the immigration laws, and concluded that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. [Citations omitted]. So long as such distinctions are not wholly irrational they must be sustained." 617 F.2d at 747.

Although Congress significantly altered the system of nationality-based quotas for the issuance of immigration visas in 1965, *see* 1 C. Gordon & H. Rosenfield, *supra*, at § 1.4c, it has not disturbed a variety of administrative provisions that distinguish among aliens on the basis of national origin. *See, e.g.*, 8 C.F.R. § 101.1 (presumption of lawful admission for certain national groups); *id.* § 212.1 (documentary requirements for nonimmigrants of particular nationalities); *id.* § 252.1 (relaxation of inspection requirements for certain British and Canadian crewmen). The courts have generally viewed such classifications as within the permissible scope of executive discretion. *See, e.g., Nademi v. INS*, 679 F.2d 811 (10th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982); *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir.1981); *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir.1980).

the statutory grant of discretion by Congress, the regulations promulgated by the agencies involved, and the policies which had been established by the President and the Attorney General. If the court should find that low-level immigration officials have discriminated on the basis of national origin despite the adoption of a contrary policy by their superiors in the executive branch, such conduct would constitute an abuse of discretion that would justify appropriate relief. Without expressing any opinion on this score, we note that the district court may wish to reconsider whether class treatment is still an appropriate vehicle for making the determinations set forth above. We therefore remand for further proceedings in light of this opinion.

III. NOTICE OF THE RIGHT TO SEEK ASYLUM

Plaintiffs also contend that the class members are entitled to notice of their right to present a claim to the district director for political asylum under the Refugee Act of 1980 and its attendant regulations. The district court dismissed this claim on the grounds that it would "merge" into a final order of exclusion and was therefore subject to review only on habeas corpus pursuant to 8 U.S.C. § 1105a. *Louis v. Meissner [Louis II]*, 532 F.Supp. 881, 888–89 (S.D.Fla.1982). We conclude that neither the finality provision nor the exhaustion requirement of § 1105a bars review of this claim and therefore reach the merits, holding that plaintiffs do not have a right to be notified of the opportunity to seek asylum provided by the Refugee Act of 1980.

A. *The Jurisdictional Issue*

[20] The first question we must resolve is whether this court can properly reach the notice issue in the absence of a final order of exclusion. The problematic statutory authority here is 8 U.S.C. § 1105a, which provides in relevant part:

> (b) Notwithstanding the provisions of any other law, any alien against whom a *final* order of exclusion has been made heretofore or hereafter ... may obtain judicial review of such order by habeas corpus proceedings *and not otherwise*.
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations....

(emphasis added). Because plaintiffs in this case have not yet undergone exclusion hearings, the district court was confronted with the question whether § 1105a(b) applies only to final orders of exclusion or whether it also precludes review of challenges to preliminary procedures employed in exclusion proceedings prior to the entry of a final order. The district court concluded that the provisions of the statute are "ambiguous and unclear" in this regard and sought additional guidance by scrutinizing the legislative history of § 1105a. Finding that "Congress' intent in enacting Section 1105a was to end the seemingly endless procedural delays that allowed an excludable or deportable alien to prolong his departure from this country," the district court reasoned that "[i]t is inconceivable to believe that Congress would legislate against the delays that can follow the entry of a final order of exclusion without intending to cut off similar dilatory practices that might be utilized prior to the entry of an order." *Louis II*, 532 F.Supp. at 886–87. The lower court therefore dismissed plaintiffs' claim.

Shortly after the district court rendered its decision this court recognized a narrow exception to the general rule of nonreviewability pending the entry of a final order in *HRC v. Smith*. In that case the question was whether the district court could review the plaintiffs' challenges to such INS practices as setting ten-day limits for the filing of asylum claims and scheduling many hearings on asylum petitions simultaneously.[31]

31. Deportable aliens, such as the Haitians involved in *HRC v. Smith*, are subject to a different review procedure under § 1105a(a), whereby the circuit courts of appeal are vested with exclusive jurisdiction to review "all final orders of deportation ... made against aliens within

The *HRC* panel concluded that because the complaints raised by the plaintiffs addressed "matters alleged to be part of a pattern and practice by immigration officials" to violate the rights of aliens under the Refugee Act, they constituted wrongs "which are independently cognizable in the district court under its federal question jurisdiction." 676 F.2d at 1033.[32] The court further explained that:

> The distinction we draw is one between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers *when a wholesale, carefully orchestrated, program of constitutional violations is alleged.*

Id. (emphasis added); *see also Cheng Fan Kwok v. INS*, 392 U.S. 206, 210, 88 S.Ct. 1970, 1973, 20 L.Ed.2d 1037 (1968); *Fleurinor v. INS*, 585 F.2d 129, 135–36 & n. 6 (5th Cir.1978) (noting that although the circuit court lacked jurisdiction under § 1105a(a), "allegations of procedural irregularities in the asylum proceeding would be reviewable in the appropriate district court"); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 364 (C.D.Cal.1982).

The *HRC* panel therefore emphasized the importance of distinguishing between an individual challenge on a preliminary procedural matter, which the finality provisions of § 1105a would govern, and allegations of widespread abuses by immigration officials. In the latter case, postponing conclusive judicial resolution of a disputed issue that affects an entire class of aliens until an individual petitioner has the opportunity to litigate it on habeas corpus would foster the very delay and procedural redundancy that Congress sought to eliminate in passing § 1105a. For this reason, we conclude that § 1105a(b) does not prohibit us from considering plaintiffs' claims that they have a right to notice of the opportunity to seek asylum. We stress that our holding is a narrow one that should not be construed to permit judicial review of run-of-the-mill interlocutory procedural rulings by an immigration judge with which an alien happens to disagree. As the panel stated in *HRC v. Smith*,

> [s]uch a result would indeed defeat the congressional purpose behind the enactment of section [1105a]—the elimination of dilatory tactics by aliens challenging deportation orders in a piecemeal fashion.... We do not intend by our holding today to emasculate that solution, and given the narrowness of our holding, we do not expect such a result.

676 F.2d at 1033.

[21] The district court also suggested that review of plaintiffs' claim of a right to notice was barred by their failure to exhaust their administrative remedies as required by § 1105a(c). *Louis II*, 532 F.Supp. at 887–88 & n. 8. As the *HRC* court pointed out, however, "[i]t is tautological that the exhaustion doctrine does not preclude the exercise of jurisdiction when there are no further administrative remedies to pursue." 676 F.2d at 1035. This is precisely the situation with regard to petitioners'

the United States pursuant to administrative proceedings under section 1252(b) [deportation hearings]...." Although the review procedure is therefore somewhat different for resident aliens, the basic considerations of fairness and judicial economy that concerned the *HRC* court are clearly applicable in the present context as well.

32. To the extent that the jurisdictional arguments of *HRC* may be read as resting on constitutional grounds, the applicable language is disapproved. In this case, plaintiffs' claim could be heard by the district court pursuant to its jurisdiction under 28 U.S.C. § 1331, since petitioners are seeking a determination whether the Refugee Act of 1980 and its accompanying regulations require the INS to notify aliens of their right to apply for political asylum prior to the commencement of exclusion proceedings before an immigration judge. *See, e.g.*, 8 U.S.C. § 1101(a)(42); *id.* § 1158(a); *id.* § 1253(h); 8 C.F.R. § 208.3. Because plaintiffs' complaint raises the issue whether the agency has acted in accord with the statutory mandate of Congress, as well as its own regulations and procedures, the district court can sustain jurisdiction over this claim under the reasoning set forth in section II.C above.

claim on the notice issue." Under the applicable regulations, an alien who wishes to apply for asylum can get two bites at the apple: first, by presenting his claim to the INS district director prior to the commencement of exclusion proceedings against him, 8 C.F.R. § 208.2(a), and second, by filing a request with the immigration judge after the exclusion hearing has begun. *Id.* § 208.3(b). If the alien does not file an application with the district director before the commencement of the exclusion proceedings against him, this first opportunity to seek asylum is simply lost, because the immigration judge and the Board of Immigration Appeals have no authority over, or ability to remand proceedings to, the district director. *HRC v. Smith*, 676 F.2d at 1036 (noting that "the BIA could not grant relief for procedural errors in asylum proceedings before the district director"); *see also* 8 C.F.R. § 3.1(b). The existence of unexhausted administrative remedies—such as a request to withhold deportation under 8 U.S.C. § 1253(h)—applicable to an alien's opportunity to apply for asylum before the immigration judge therefore cannot justify invoking the exhaustion doctrine with respect to a challenge to the procedure before the district director. *See HRC v. Smith*, 676 F.2d at 1035–36. We conclude that neither the finality provision of § 1105a(b) nor the exhaustion requirement of § 1105a(c) bars us from reaching the merits of plaintiffs' claim at this time.

B. *The Merits*

In *HRC v. Smith* this court recognized that the Refugee Act of 1980 and its accompanying regulations created a "right to petition our government for political asylum." 676 F.2d at 1038. Several courts have reasoned that the government must be required to notify aliens who face exclusion or deportation of the opportunity to apply for asylum if this right is to be effectuated. *See, e.g., Jean*, 711 F.2d at 1507–08; *Orantes-Hernandez*, 541 F.Supp. at 361; *Nunez v. Boldin*, 537 F.Supp. 578, 586 (S.D. Tex.), *appeal dismissed*, 692 F.2d 755 (5th Cir.1982). We disagree.

[22] The first point that requires clarification is the nature of the right recognized in *HRC v. Smith*. The Supreme Court has recognized that some state or federal laws can, by creating substantive entitlements to particular government benefits, lead to the constitutional protection of those benefits as "liberty" or "property" interests within the meaning of the Due Process Clause of the fourteenth amendment. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S.Ct. 2963, 2985, 41 L.Ed.2d 935 (1974). However, when dispensation of a statutory benefit is clearly at the discretion of an agency, or when a statute only provides that certain procedural guidelines be followed in arriving at a decision, then there is no creation of a substantive interest protected by the Constitution. *Hewitt v. Helms*, — U.S. —, —, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983); *Bishop v. Wood*, 426 U.S. 341, 345–47, 96 S.Ct. 2074, 2077–78, 48 L.Ed.2d 684 (1976); *Olegario v. United States*, 629 F.2d 204, 223–224 (2d Cir.1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981).

[23] Under this analysis, it is clear that the Refugee Act does not create an entitlement to asylum. Instead, it states merely that an alien "*may* be granted asylum *in the discretion* of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C. § 1101(a)(42)(A)]." 8 U.S.C. § 1158(a) (emphasis added).[33] Because the Act creates only a right to petition for asylum, it carries with it no guarantee of securing the substantive relief sought. *HRC v. Smith*, 676 F.2d at 1038–39 & n. 37. The grant of asylum does not, therefore,

33. Although 8 U.S.C. § 1253(h) prohibits the Attorney General from deporting an alien if he determines that the alien's life or freedom would be jeopardized by returning him to a particular country, this provision does not create a substantive entitlement to asylum, but simply to relief from deportation to that country.

create an interest protected by the due process clause.[34]

[24] In the absence of a constitutional right, the only procedures to which plaintiffs are entitled are those granted by the statute or the agency. As we have noted, the agency is required to comply with applicable statutory provisions and its own regulations and policy statements. *See, e.g., Accardi*, 347 U.S. at 267, 74 S.Ct. at 503; *HRC v. Smith*, 676 F.2d at 1041 n. 48; *Olegario*, 629 F.2d at 224. Given the statutory mandate instructing the Attorney General to "establish a procedure for an alien physically present in the United States or at a land border or port of entry . . . to apply for asylum," 8 U.S.C. § 1158(a), the *HRC* panel was clearly correct in finding that the statute and its accompanying regulations reflect Congress' "clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum." 676 F.2d at 1038. The question then becomes whether notice of the opportunity to apply for asylum before the district director is clearly mandated by the terms of the Refugee Act.

We conclude that it is not. The Act plainly contains no express statement of such a requirement. Appellees instead base their claim largely on the following statement in a Senate committee report on the Refugee Act:

> The bill requires the Attorney General to establish a uniform procedure for passing upon an asylum application. The Committee believes such a uniform procedure should include a provision allowing all asylum applicants an opportunity to have their claims considered outside a deportation and/or exclusion proceeding, *provided the order to show cause has not been issued.*

S.Rep. No. 256, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.Code Cong. & Ad.News 141, 149 (emphasis added). Despite appellees' contentions, however, the fact that Congress sought to provide an additional, non-adversarial procedure for hearing asylum requests does not support the conclusion that Congress intended to require notice of the opportunity to petition the district director for asylum. An "order to show cause" is issued by the INS and serves to notify an alien that the deportation process against him has commenced. *See* 8 C.F.R. § 242.1. Congress therefore clearly intended to limit the right to an alternative asylum procedure to the period before the formal deportation or exclusion proceeding has begun. Thus, far from treating the right to petition the district director as a critical part of its asylum scheme, Congress provided that this opportunity should expire within a definite time limit, suggesting that it regarded this procedure as a desirable but by no means essential part of the asylum process. The terms of the applicable regulations are in keeping with this intention, specifying that an alien may file a petition for asylum with the district director when the alien "(1) Is seeking admission to the United States, or; (2) Is in the United States, regardless of his/her status, and has not been placed under exclusion proceedings or served an order to show cause." 8 C.F.R. § 208.3(a).

Because Congress made no direct reference to a notice requirement and the provisions of the applicable regulation appear to accord with the intent that Congress did express, plaintiffs must ultimately fall back on the assertion that a right to notice derives *a fortiori* from the establishment of an asylum procedure. The weakness with this argument is that Congress provides many opportunities to the people of this country without requiring the government to publicize their availability or to take affirmative action to notify possible beneficiaries. It has never been held, for example, that the government must inform individuals that they have the right to sue the government for tort claims, or the right to seek educational loans or public assistance. In addition, requiring mandatory notice of the op-

34. This conclusion affirms what we stated in note 27, *supra*, *i.e.* that we disavow any language used by the *HRC* court that might be read to suggest that excludable aliens have constitutional rights under the fifth amendment with regard to their applications for admission, asylum, or parole within this country.

portunity to seek asylum may actually serve to frustrate Congress' intention of preserving aliens with a well-founded fear of persecution in their home countries from repatriation. As one commentator notes:

> [B]lanket notice will also tempt even those without any fear of persecution to latch on to asylum as their last hope....
>
> ....
>
> [T]oo many asylum applications may only bury the truth by straining INS resources and preventing careful assessment of individual claims. If the volume of asylum claims rises significantly, the INS may feel compelled to rely more and more on group profiles and less on individual evidence and credibility.

Note, *Protecting Aliens from Persecution Without Overloading the INS: Should Illegal Aliens Receive Notice of the Right to Apply for Asylum?*, 69 Va.L.Rev. 901, 922, 924 (1983).

We therefore conclude that although aliens have a protected statutory and regulatory right to petition for asylum, neither the Constitution nor the Refugee Act and its accompanying regulations require the INS to inform all potential applicants of their right to seek asylum.[35] Although our reasoning differs somewhat from that employed by the court in *HRC v. Smith*, we reaffirm its conclusion that the existence of this protected right to apply for asylum bars government officials from adopting policies that conflict with the terms of the statute, applicable regulations, and their own announced operating procedures.

IV. RIGHT OF ACCESS TO DETAINEES

Petitioners also contend that the government has placed extensive restrictions on contacts between outsiders and the Haitian detainees, thereby frustrating the efforts of Haitian Refugee Center (HRC) attorneys to inform them of their legal rights. Plaintiffs originally challenged these restrictions on a number of grounds, but the district court dismissed all of them prior to trial except a first amendment claim. The latter claim was dismissed by the district court after trial on grounds of mootness, since the court's final order released all the Haitians in detention at that time. Plaintiffs challenge the mootness holding and request a determination on the merits.

[25, 26] Since a substantial number of class members are now being held in detention, either because they arrived in this country after the government promulgated its new regulations under the APA or because their parole was revoked after the district court's decision, it is clear that the first amendment claim is not moot. Because the district court did not decide this issue, however, there is no factual record before us, and we conclude that it would be improper for us to reach a decision on the merits. The Supreme Court has repeatedly emphasized that counsel have a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration, *see, e.g., In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *NAACP v. State ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), but this claim presents a number of questions that require the development of a factual record. We note that the restrictions challenged by plaintiffs do not amount to an absolute denial of access, and the rules involved are not of such a nature that we can strike them down as facially impermissible even without an awareness of possible counter-

35. The INS' current policy is apparently to inform arriving aliens of their right to seek asylum only if they have questions during their initial interviews with INS officials that "flag asylum claims such as fear of persecution upon being returned...." *Caribbean Migration: Oversight Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 225 (1980) (statement of David Crosland, Acting Commissioner, INS). Of course, if INS officials were refusing to inform aliens of their right to seek asylum even if they did indicate that they feared persecution if returned to their home countries, our conclusions would be different. This would constitute a clear violation of the Refugee Act, and remedial action would be justified under *HRC v. Smith*.

vailing considerations. Because the regulation of aliens in detention may implicate security concerns similar to those that apply in the prison context, the district court will clearly need to hear evidence on these matters to arrive at the proper balance between the government's interest in security and the HRC's interest in exercising its first amendment rights. We therefore remand this claim to the district court for its consideration in light of the principles set forth above.

V. CONCLUSION

In summary, we conclude that under well-established Supreme Court precedents excludable aliens such as the Haitian plaintiffs have no constitutional rights with respect to their applications for admission, asylum, or parole. The courts do have authority, however, to review the decisions of executive officials in the immigration area to ensure that they have exercised their discretion in accordance with the applicable statutes, regulations, and the announced policies of their agencies. We emphasize that while it is not the role of the courts to substitute their own judgment for that of executive officials, the courts are not powerless to act when government officials have either failed to exercise their discretion or abused it by acting outside the scope of their delegated authority. Thus, although we conclude that high-level executive officials such as the President and the Attorney General have the authority under the INA to draw distinctions between classes of aliens, discrimination on the basis of national origin by low-level officials in violation of an official executive policy would constitute an abuse of discretion, justifying appropriate remedial action by the courts.

Because we hold that the government's promulgation of regulations under the notice and comment provisions of 5 U.S.C. § 553 to govern the new detention policy has mooted the issue of agency compliance with the APA, we dismiss that part of the appeal and remand with instructions that the injunctive relief grounded on the claimed APA violation be vacated. With regard to those class members currently in detention under the new regulations, the district court should conduct appropriate proceedings to determine whether any relief is necessary in light of the considerations set forth in this opinion. While we reaffirm the holding of the panel in *HRC v. Smith* that the provisions of the Refugee Act of 1980 and its attendant regulations confer a protected statutory and regulatory right to apply for asylum, we conclude that blanket notice of this opportunity to all aliens faced with exclusion or deportation is not mandated by the explicit provisions of the Act, the applicable regulations, or the underlying congressional intent. Finally, we remand to the district court for the development of a factual record the question whether the government's restrictions on access to the Haitian detainees are impermissible under the first amendment.

The complex nature of the questions presented by this case has required detailed consideration, but our ultimate holding is simple and straightforward. Excludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution. They do have rights, however, to whatever process Congress—and through its regulations and established policies, the Executive branch—have extended them. Our holding therefore recognizes that while the courts must give proper deference to the plenary power of the political branches to regulate the admission of aliens into our country, the foreigner who comes to our shores with hopes of gaining entry does not stand altogether outside the protection of our laws.

DISMISSED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

TJOFLAT, concurring in part and dissenting in part:

I concur in the result of the majority opinion vacating the district court's decision, and in all but part II C of the majority

opinion. I dissent regarding the scope of the review we today authorize the district court to take of the Attorney General's parole policy.

The majority would have the district court determine on remand:

> whether the criteria [local immigration officials] employed in making [parole] determinations were consistent with the statutory grant of discretion by Congress, the regulations promulgated by the agencies involved, *and the policies which had been established by the President and the Attorney General.* If the court should find that low-level immigration officials have discriminated on the basis of national origin *despite the adoption of a contrary policy by their superiors in the executive branch,* such conduct would constitute an abuse of discretion that would justify appropriate relief.

Majority opinion at 979 (emphasis added). Insofar as this would require the district court to decide, without consulting the Attorney General himself, how the Attorney General really must have meant to exercise his discretionary parole authority in a particular situation, it casts the district court into an evidentiary quagmire that is not only impractical and unnecessary, but also threatens to destroy the broad discretion Congress granted to the Attorney General in 8 U.S.C. § 1182(d)(5)(A).

We do have the authority to conduct some review of the Attorney General's discretionary decisions regarding parole. *See Mathews v. Diaz,* 426 U.S. 67, 81–2, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976); *Kleindienst v. Mandel,* 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). *See also Bertrand v. Sava,* 684 F.2d 204, 210 (2d Cir. 1982); *Palma v. Verdeyen,* 676 F.2d 100, 105 (4th Cir.1982). However, we undertake a very narrow review of such decisions; the High Court held in *Kleindienst* that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against [other interests]." 408 U.S. at 770, 92 S.Ct. at 2585. In reviewing the Attorney General's decision we might well, for notice reasons, limit his discretionary authority by official policy statements in CFR, but by little else. We respect Congress' broad delegation of power to the Executive in such areas because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government [and as such is] largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy,* 342 U.S. 580, 588–89, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952) (footnote omitted), quoted in *Mathews, supra* at 81 n. 17, 96 S.Ct. at 1892 n. 17.

The Attorney General has discretion in this area in part to enable him to react flexibly to new situations, and his officers in the field are his eyes and ears in his determination of the best way to exercise his discretion. For this reason, instead of asking the district court to interfere in questions of intra-INS communication and discipline, I would assume the Attorney General to adopt the actions of his officers in the field and ask him to justify them in court, according to our "abuse of discretion" standard, if he wishes to do so. If the field officers have strayed from the Attorney General's wishes, the matter is thus brought to his attention and he can conduct the necessary intra-office discipline. If, as is more likely, the field officers have acted pursuant to policies implicitly, if not expressly, approved by the Attorney General, his decisions will be subject to the requisite narrow judicial review.

The majority implies that the district court will have an easy time in this case determining what the Attorney General's policy on nationality is, without asking him, because a "facially neutral" policy statement on parole exists at 8 CFR 212.5. The policy in CFR is not a comprehensive policy, however. It merely sets out a few specific categories of aliens e.g. pregnant women, those suffering medical emergencies, or certain juveniles, who the district director *gen-*

erally should parole in the absence of countervailing security risks. It leaves the weighing necessary to making parole decisions regarding these categories, as well as all other parole decisions, purely in the discretion of the district director. Such a minimal directive is not enough to infer with any certainty that the Attorney General never wants district directors, in making parole decisions, to consider nationality.

In order for the district court to find a "governing policy" on nationality, or specifically on Haitians, it may be necessary for the court to probe extensively into internal office memoranda, oral instructions between supervisors and employees at all levels, and even into intangible intra-office expectancies regarding what is, or what is not, approved conduct. Such an investigation obviously would be impractical in the extreme, and more important, would be totally unnecessary when all this court need do is ask the Attorney General whether he adopts his subordinate's action.

The only issue concerning the court under our narrow standard of review should be whether an action undertaken by the Attorney General, or undertaken by his subordinates and adopted or approved, implicitly or explicitly, by the Attorney General, is outside his broad discretion under 8 U.S.C. § 1182. To that end, the district court on remand should confine itself to asking the Attorney General to justify in the appropriate manner the actions undertaken by him or his department. Otherwise the district court is thrust between the Attorney General and his employees as an interpreter, telling the field officials, in effect, "Your boss did not really mean for you to do X; rather he wants you to do Y." Such a review would limit the Attorney General's discretion by curtailing his ability to react flexibly to changing situations; the district court would constantly be stepping in and reversing field officers' actions unless a paper trail from the Attorney General's office authorized the action. Congress, in granting the Attorney General discretion in parole matters, certainly never intended such an intrusive review; nor can such review be reconciled with the very narrow review of immigration decisions authorized in prior Supreme Court decisions.

KRAVITCH, Circuit Judge, specially concurring in part and dissenting in part with whom JOHNSON, HATCHETT and CLARK, Circuit Judges, join.

I concur in the result for all but Part III.C of the majority's opinion. I write specially as to Part II.B and dissent as to Part III.C.

That Congressional and Executive authority over immigration matters is broad and far reaching is beyond question. Nor is it disputed that aliens seeking entry into this country can claim few constitutional protections regarding their entry. I write specially, however, because I believe that the majority opinion has unnecessarily and incorrectly eroded those few rights to which the courts have determined excludable aliens are entitled under either Congressional statutes or the Constitution.

I.

I initially question, given the majority's treatment of the issues involved as ones concerning abuse of discretion, the opinion's extensive discussion of the constitutional rights of excludable aliens. The majority states that because the INS now has adopted facially neutral criteria for parole, "[t]he question that the district court must therefore consider with regard to the remaining Haitian detainees is thus not whether high level executive branch officials such as the Attorney General have the discretionary authority under the Immigration and Nationality Act [INA] to discriminate between classes of aliens, but whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors." *Supra*, at p. 963. Similarly, the majority later notes that "because the government has contended throughout this case that its new detention policy does not discriminate on the basis of national origin, resolution of [whether the executive can discriminate on

the basis of national origin]-is not essential to our holding ...." *Supra*, at p. 978.

It is a basic proposition that "prior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 2199, 68 L.Ed.2d 693 (1981). Here, the majority, in light of the Executive's contention that it was not discriminating and the INS's new facially neutral regulations, has chosen to treat the plaintiffs' claims of discrimination as a non-constitutional contention that low-level INS officials abused their discretion in following the regulations. I do not disagree with the majority that any abuse of discretion questions, as non-constitutional grounds for decision, should have been the first questions addressed. Indeed, the majority is entitled to conclude that the district court and panel erroneously reached the constitutional questions before the non-constitutional ground of abuse of discretion. By choosing that mode of analysis, however, the constitutional powers of Congress or the Executive to discriminate on the basis of national origin in granting parole or the constitutional rights of excludable aliens are not properly before us, and any such discussion by the majority can only be viewed as dicta in deciding future cases.[1]

II.

I am also unable to agree with the majority's conclusion that "responsible executive officials such as the President or Attorney General possess [the] authority [to discriminate on the basis of national origin] under the INA." *Supra*, at p. 978.[2]

The provisions of 8 U.S.C. § 1182(d)(5) grant the Attorney General the discretion to parole "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." The grant of discretionary power, therefore, is facially neutral on the basis of the statute's language. Likewise, the legislative history of the provision centers on non-discriminatory factors, such as reuniting families and medical reasons. That the statute is facially neutral is further evidenced by other statutes in which Congress has given the Executive the power to discriminate on the basis of national origin. For example, in contrast to the parole statute, which contemplates individual consideration based on non-discriminatory factors, 8 U.S.C. § 1182(f) gives the Executive the power to bar entry of "any class of aliens" when "the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental...."[3] Congress thus has shown that it knows how to grant the Executive the authority to discriminate based on national origin where it deems necessary, but no such grant can be found from the language of section 1182(d)(5).

The case that the majority primarily relies upon reaches a similar conclusion as to the nature of the parole statute. The Second Circuit in *Bertrand v. Sava* held:

> Section 1182(d)(5) permits the Attorney General to deny parole to all or to certain groups of unadmitted aliens on the ground that he finds no emergent or public interest reasons justifying their release on parole. The discretion may not be exercised to discriminate invidiously against a particular race or group or to

1. The case on which the majority primarily relies, *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982), did not reach the constitutional question of due process. *Id.* at 207 n. 6. The court noted that on the facts presented any discrimination that would arguably violate the Fifth Amendment would also constitute an abuse of discretion. The *Bertrand* court, therefore, properly did not reach the due process issue, as it could decide the issue presented on non-constitutional grounds.

2. I also question whether the *statutory* power of the Executive to discriminate under 8 U.S.C. § 1182(d)(5) is properly before us, as the majority has refined the issue to abuse of discretion by lower-level officials. Because the abuse of discretion question may involve questions of the Executive's statutory authority, however, I feel it necessary to address the majority's reasoning.

3. Even the broad powers granted by 8 U.S.C. § 1182(f), however, require that the President find that the entry "be detrimental;" presumably, this finding would have to be legitimate and not merely pretextual.

depart without rational explanation from established policies. *See Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715, 719 (2d Cir.1966). Such exercise of the power would not be "legitimate and bona fide" within the meaning of *Kleindienst v. Mandel*. 684 F.2d 204, 212 (2d Cir.1982).[4]

The parole statute, therefore, grants the Attorney General wide discretion to deny or grant parole, but the exercise of that discretion must be based upon legitimate and bona fide reasons. To conclude, as the majority does, that the Executive may discriminate under the facially neutral parole provisions of the INA contradicts the principle expressly acknowledged by the majority: where Congress has acted in regulating the admission of aliens, the Executive's power is restricted. *See supra*, at pp. 974–975. *See also INS v. Phinpathya*, —— U.S. ——, 104 S.Ct. 584, 563, 78 L.Ed.2d 401 (1984) (Congress designs the immigration laws); *United States v. Frade*, 709 F.2d 1387 (11th Cir.1983) ("power over immigration matters belongs jointly to the legislature and executive branches, and when exercised by the President, should be in conformity with Congressional intent.") Here, Congress has not given the Executive the power to discriminate in parole decisions based solely on nationality.[5]

Requiring the Attorney General to exercise his discretion based on rational reasons is neither overly burdensome nor unduly restrictive of his powers. Legitimate reasons could necessitate blanket detention of all aliens from a certain country in a crisis situation such as a medical epidemic in the country of origin or for national security reasons. Indeed, in my view, the Attorney General could adopt a policy of denying parole to all aliens, choosing to allow release only for medical or other non-discriminatory reasons.[6] My objection to the majority's reading of the INA is the conclusion that the Attorney General may invidiously discriminate in the granting of parole merely because the Executive decides, without rational reason, that aliens from a certain country should be denied temporary parole.[7]

Nor does such a view create the possibility that the United States would "lose control over our borders." *Supra*, at 975. The scenario that the majority describes of a foreign leader sending over citizens of his country and "compel[ling] us to grant physical admission via parole . . .," *supra*, at 975, is both irrelevant to the holding and unnecessarily alarmist.

First, here we are concerned only with the discriminatory denial of temporary parole prior to deportation or exclusion proceedings; hence, the constitutionality of "indefinite detention" is not properly before us. Second, to the extent pre-deportation parole is relevant, such a de facto invasion envisioned by the majority would present a rational basis for the Attorney General to deny temporary parole. Third, the President has the capability of preventing any such crisis under 8 U.S.C. § 1182(f) (cited

4. The majority also relies on *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir.1979), cert. *denied*, 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980), for the proposition that the Executive has the power to discriminate against aliens on the basis of nationality. *Supra* at 978 n. 30. The *Narenji* court qualified that power, however, by noting that "[s]o long as such distinctions are *not wholly irrational* they must be sustained." 617 F.2d at 747 (emphasis added). Likewise, the other cases the majority relies on either required a rational reason for the Executive's action, *Nademi v. INS*, 679 F.2d 811, 814 (10th Cir.1982); *Malez-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir.1981), or did not reach the question, *Yassini v. Crosland*, 618 F.2d 1356, 1362 & n. 7 (9th Cir.1980). All these cases also involved the Iranian crisis, thus adding the President's foreign affairs power to the Executive's reasons for acting.

5. The majority's reading would also, of course, allow the Attorney General to deny parole without justifiable reason on the basis of religion, race, gender or economic class.

6. The district court found that this policy is in essence that of the present administration. *Louis v. Nelson*, 544 F.Supp. 973, 980–81 (S.D. Fla.1982).

7. Because we are dealing with a question of statutory interpretation, I decline to address the equal protection or due process issues that would be raised if the Attorney General adopted new regulations discriminating on the basis of nationality.

by the majority as an example of the Executive's broad powers) and § 1185(a), which gives the President broad powers to act during a national emergency or time of war; moreover, such an "attack" on our borders would likely fall under the Executive's foreign affairs power. Finally, the majority's prime concern—ensuring that excludable aliens could be detained indefinitely *without a justifiable reason*[8]—would extend the holdings of those cases cited by the majority beyond their intended scope and meaning.[9]

III.

I also disagree with the majority's conclusion that excludable aliens do not have a constitutional right to be notified of their protected right to apply for asylum.

The predecessor of this court in *HRC v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982),[10] held that it was Congress' "clear intent to grant aliens *the right to submit and the opportunity to substantiate* their claim for asylum." *Id.* at 1038 (emphasis added). The *Smith* court found that although aliens do not have a substantive entitlement to asylum, the Refugee Act of 1980 does create "at a minimum a constitutionally protected right to petition our government for political asylum." *Id.* The majority's opinion does not disavow these basic holdings in *Smith*. *Supra*, at 981–983, 983.

The question then becomes whether "the right to submit and the opportunity to substantiate" a claim for asylum includes the right of an alien to be notified that he has such a right in the first place. The majority concludes that no right to notice exists because it is not expressly mentioned in the pertinent statutes or regulations and because no right to notice has been found for other congressionally created opportunities, such as the availability of educational loans and public assistance. *Supra*, at 984–985.

I find such reasoning unpersuasive because it ignores the reality of the situation before us and frustrates Congress' intent in passing the Refugee Act of 1980. The Refugee Act was enacted to give "statutory meaning to our national commitment to human rights and humanitarian concerns." S.Rep. No. 96–256, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S.Cong. & Adm.News 141. Those aliens to which Congress intended the Act to apply will frequently arrive on our shores ignorant of our legal system and unschooled in our language. If the Act truly is to have "meaning," and the constitutionally protected right to petition for asylum recognized by the *Smith* court is to have any substance, these individuals must be informed that the procedures and

8. If the aliens in question posed a risk to society or national security, or created other problems necessitating detention, such dangers would of course provide a rational reason for the Executive to continue detention. Because the majority's scenario poses a situation where no legitimate reason for further detention exists, we must assume that they are concerned with the Executive's power to detain excludable aliens who could not otherwise be detained except for their status as excludable aliens.

9. It is worth noting that in *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953), the alien involved posed a security risk; a factor which the Supreme Court not only found to be important, but also a distinguishing factor from normal parole proceedings:

> It is true that resident aliens temporarily detained pending expeditious consummation of deportation proceedings may be released on bond by the Attorney General whose discretion is subject to judicial review. *Carlson v. Landon*, 1952, 342 U.S. 524 [72 S.Ct. 525, 96 L.Ed. 547]. By that procedure aliens uprooted from our midst may rejoin the community until the government effects their leave. *An exclusion proceeding grounded on danger to the national security, however, presents different considerations*; neither the rationale nor the statutory authority for such release exists.

345 U.S. at 215–16, 73 S.Ct. at 630–31 (emphasis added).

As the majority notes, there are also other factual differences that distinguish *Mezei* from the questions presented here. *See supra* at 985 n. 6.

10. This circuit has adopted as binding precedent all decisions of former Fifth Circuit Unit B. *Stein v. Reynolds Securities Inc.*, 667 F.2d 33 (11th Cir.1981).

rights provided by the Act are available to them. To hold otherwise is to effectively negate Congress' effort to provide aliens a meaningful opportunity to present legitimate claims for asylum.[11]

Because notice is an inseparable part of the constitutionally protected right to petition for asylum under the Refugee Act, and because notice would effectuate Congress' intent, I would hold that the due process protections accorded by the *Smith* court encompass the right to notice.

Henry Arthur DRAKE, Petitioner-Appellant,

v.

Robert O. FRANCIS, Respondent-Appellee.

No. 83-8047.

United States Court of Appeals, Eleventh Circuit.

Feb. 29, 1984.

Petition for writ of habeas corpus was filed by Georgia inmate who had been convicted, 241 Ga. 583, 247 S.E.2d 57, of murder and armed robbery. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., C.J., denied petition, and inmate appealed. The Court of Appeals, Albert J. Henderson, Circuit Judge, held that: (1) bare assertion of third-party confession following conviction was insufficient to warrant habeas relief; (2) there was no due process violation in prosecuting inmate under different theory than that propounded in fellow defendant's trial; (3) inmate failed to make out due process claim arising out of prosecution's alleged knowing use of perjured testimony; (4) prosecutor's closing remarks during sentencing hearing, in which prosecutor read from two nineteenth century Georgia cases and then drew attention to case of a well-known executed convict, so inflamed passions and prejudices of jury that death penalty had to be vacated and cause remanded for resentencing even if remarks, as asserted by prosecution, were directed to court and not to jury; (5) instructions did not unconstitutionally shift burden of proving intent from state to inmate; (6) submitted statutory aggravating circumstance was a proper consideration for jury; and (7) jury charge in sentencing phase was sufficiently clear to pass constitutional muster.

Affirmed in part, reversed in part, and remanded.

Johnson, Circuit Judge, dissented and filed an opinion.

1. Habeas Corpus ⇐45.1(1)

Direct appeal is primary vehicle for review of state court convictions and role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐25.1(1)

In order for a claim of newly discovered evidence to justify habeas review, evidence must bear on constitutionality of defendant's conviction. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇐25.1(1)

Role of habeas corpus is limited to consideration of challenges to legality of a conviction; it may not be used to retry defendant's innocence or guilt. 28 U.S.C.A. § 2254.

11. The majority suggests that if all aliens were given notice, the danger exists that legitimate claims would be overshadowed by frivolous claims. *Supra* at 984. Certainly, if aliens are not notified of their right to petition for asylum there will be fewer claims, as the aliens will not be aware that such a right exists. The problem with the majority's solution for weeding out frivolous claims is that it also leads to the loss of the right to petition by aliens with legitimate claims, thus effectively emasculating the very rights that Congress intended to create.

F.2d 1170, 1199 (9th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979).

XI. *Conclusion*

For the reasons discussed above, we affirm all convictions of each appellant.



Marie Lucie JEAN, et al., Plaintiffs,

Lucien Louis, et al., Plaintiffs-Appellees, Cross-Appellants,

State of Florida, Intervenor-Appellant,

v.

Alan C. NELSON, et al., Defendants-Appellants, Cross-Appellees.

No. 82-5772.

United States Court of Appeals, Eleventh Circuit.

April 12, 1983.

The United States District Court for the Southern District of Florida, Eugene P. Spellman, District Judge, entered order releasing over 1,000 aliens held in detention by United States Government pursuant to policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility, and, following Government's submission of notice of intention to engage in rule making, granted partial stay, and Government appealed and plaintiff class cross-appealed discrimination and access issues as well as jurisdictional dismissal of procedural claims. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) determination to make policy change was properly within realm of Executive decision making; (2) recourse to notice and comment rule making was required; and (3) determination that there was no discrimination against plaintiff class in enforcement of policy change was erroneous.

Affirmed in part, reversed in part, and remanded.

1. Aliens ⇐39

Although Executive, in concert with Congress, has wide authority to act to protect borders, governing branches must nonetheless act within letter of the law.

2. Aliens ⇐39

Authority of political branches over immigration matters and aliens is plenary and knows few bounds.

3. Aliens ⇐39
Constitutional Law ⇐62(5)

Congress may delegate wide discretionary authority to Executive to administer immigration matters. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C.A. § 1101 et seq.

4. Aliens ⇐39

Executive's authority to administer immigration matters is limited by statutory grant of Congress. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C.A. § 1101 et seq.

5. States ⇐4.6

Protection of national borders is within authority of national government, inferred from enumerated foreign commerce, treaty, war, and naturalization powers.

6. Aliens ⇐39

Authority over national borders encompasses all immigration matters, including exclusion of aliens.

7. Aliens ⇐39

Congress and Executive branch share immigration power; such may be exercised by Executive and Senate through execution of treaties, through legislative powers of Congress, and in part by Executive acting alone as function of its plenary authority over foreign relations.

8. Aliens ⇐3

Determinative factor regarding legal "rights" of alien is whether alien has effected "entry" into this country. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C.A. § 1101 et seq.

9. Constitutional Law ⇐252

As general rule, aliens who have effected entry into country, whether lawfully or not, are accorded full panoply of traditional due process rights. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C.A. § 1101 et seq.; U.S.C.A. Const. Amend. 5.

10. Aliens ⇐53.9

Evidence supported finding that on July 31, 1981 immigration policy changed from one of ready parole with limited exceptions to one of detention with limited exceptions, but evidence that Immigration and Naturalization Service and Department of Justice failed to follow through with implementing regulations or guidelines also showed that new policy was never more than general plan.

11. Administrative Law and Procedure ⇐394

Except where "on the record" rule making is required by statute, agency engaged in rule making must follow "notice and comment" rule-making provisions of Administrative Procedure Act, which require that agency provide notice of proposed rule in Federal Register and afford opportunity for interested persons to present their views. 5 U.S.C.A. § 553(b, c).

12. Aliens ⇐53.9

Policy change whereby undocumented aliens were detained in exclusion pending determination of their admissibility was rule within purview of Administrative Procedure Act. 5 U.S.C.A. § 551(4).

13. Administrative Law and Procedure ⇐122

Structural approach of Administrative Procedure Act is to divide world of administrative action into two categories; agency either issues "order" by "adjudication" or "rule" by "rulemaking." 5 U.S.C.A. § 551 et seq.

14. Administrative Law and Procedure ⇐390

Fact that agency need not employ rule making in order to exercise its discretion on case-by-case basis does not mean it cannot or has not resorted to rule of general applicability which limits its discretionary function. 5 U.S.C.A. § 553.

15. Administrative Law and Procedure ⇐390, 395

Administrator vested with discretionary authority to act on case-by-case basis may exercise such discretion by promulgating rules of general applicability; if administrator announces general rule, however, rule-making procedures must be followed. 5 U.S.C.A. § 553(b, c).

16. Aliens ⇐53.9

Connection between policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility and conduct of foreign affairs by United States was not substantial enough to fit within foreign affairs function exemption to administrative rule-making procedures required by Administrative Procedure Act. 5 U.S.C.A. § 553(a)(1).

17. Administrative Law and Procedure ⇐395

"Interpretative rules" exempted from requirements of notice and comment rule making under Administrative Procedure Act are clarification or explanation of existing laws or regulations rather than substantive modification of existing regulations or adoption of new regulations; interpretative rules are nonlegislative, in that they are promulgated without exercise of delegated authority to create new law. 5 U.S.C.A. § 553(b)(A).

See publication Words and Phrases for other judicial constructions and definitions.

18. Aliens ⇐53.9

Policy change whereby undocumented aliens were detained at point of entry pend-

ing determination of their admissibility was not within purview of "interpretative rules" exception to notice and comment rule making required by Administrative Procedure Act. 5 U.S.C.A. § 553(b)(A).

19. Administrative Law and Procedure ⇐395

Immediacy is not determinative consideration in assessing whether policy falls within "general statements of policy" exception to notice and comment rule making required by Administrative Procedure Act. 5 U.S.C.A. § 553(b)(A).

20. Administrative Law and Procedure ⇐395

Substantial impact test is insufficient to determine whether rule is "general statement of policy" within exception to notice and comment rule making required by Administrative Procedure Act. 5 U.S.C.A. § 553(b)(A).

21. Administrative Law and Procedure ⇐390

Exceptions to rule making requirement of Administrative Procedure Act come into play when benefits of public rule-making procedures are outweighed by other considerations or when no benefits accrue to use of rule-making procedures. 5 U.S.C.A. § 551 et seq.

22. Administrative Law and Procedure ⇐394

In determining whether to apply to a given rule the "general statement of policy" exception to the notice and comment rule making required by the Administrative Procedure Act, one overriding factor frequently relied upon by courts is the extent to which the challenged policy leaves the agency, or its implementing official, free to exercise discretion to follow, or not follow, the general policy in an individual case; often referred to as examining whether the policy establishes "a binding norm," the issue is whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. 5 U.S.C.A. § 553(b)(A).

23. Administrative Law and Procedure ⇐394

If an agency, or its official, is bound to apply an airtight rule in a given case, it is important to allow specific objections prior to promulgation, lest these objections be forfeited; if, however, a sufficiently general rule guides the agency's decision, but application of the rule to a unique set of facts is subject to challenge, prior opportunity to object is less important and the balance may mitigate against notice and comment rule making. 5 U.S.C.A. § 553(b)(A).

24. Aliens ⇐53.9

Policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility was not within purview of "general statement of policy" exception to notice and comment rule making required by Administrative Procedure Act. 5 U.S.C.A. § 553(b)(A).

25. Constitutional Law ⇐274.3

Excludable aliens could seek protection under Fifth Amendment from discriminatory exercises of preexclusion parole. U.S.C.A. Const.Amend. 5.

26. Aliens ⇐53.9

Although class members challenging Executive's parole power regarding policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility ultimately sought admission to United States, their action did not relate to admission and did not challenge Congress' power in such regard.

27. Civil Rights ⇐3
Constitutional Law ⇐211(1)

Plaintiffs challenging administrative action as discriminatory must go further than identifying disparate impact and prove that challenged action was product of discriminatory intent; they need not prove discriminatory purpose was primary or dominant purpose, but must show that action taken was, at least in part, because of and not merely in spite of its adverse effect upon identifiable group.

28. Civil Rights ⇐3
Constitutional Law ⇐211(1)

Claim of discriminatory administrative action based on nationality does not differ from that based on race.

29. Civil Rights ⇐13.13(2)

In actions challenging administrative action as discriminatory, where proof of impact alone is insufficient, where stark pattern of discrimination is not evident, courts should consider circumstantial evidence, which includes historical background of decision, specific sequence of events leading up to challenged decision, departures from normal procedural sequence as well as substantive departures, legislative or administrative history, foreseeability of discriminatory impact, knowledge of discriminatory impact and availability of less discriminatory alternatives.

30. Civil Rights ⇐13.13(1)
Constitutional Law ⇐211(1)

Once plaintiffs in action challenging allegedly discriminatory administrative action come forward with evidence sufficient to support prima facie claim, burden shifts to defendant to dispel inference of intentional discrimination.

31. Civil Rights ⇐13.13(3)

Once plaintiffs in action challenging allegedly discriminatory administrative action come forward with evidence sufficient to support prima facie claim, mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut prima facie case; defendant must introduce evidence to support its explanations. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; U.S.C.A. Const.Amend. 5.

32. Constitutional Law ⇐211(1)

Although standard of proof in Title VII cases differs from that in constitutional equal protection cases, framework for proving case, i.e., prima facie case, rebuttal, ultimate proof, is the same and, when appropriate, Court of Appeals in constitutional equal protection cases draws upon Title VII cases. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; U.S.C.A. Const.Amend. 5.

33. Civil Rights ⇐13.13(3)

In action challenging allegedly discriminatory administrative action, should government succeed in rebutting plaintiffs' prima facie case, trial judge must evaluate weight of evidence; it is task of trier of fact to decide whether plaintiffs have succeeded, in face of government's rebuttal, in proving by preponderance of evidence that government's actions were taken in part because of discriminatory intent or purpose.

34. Aliens ⇐54.1(4)

In action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility, Government's arguments attacking validity of plaintiffs' statistical evidence and proffering explanations to dispel appearance of disparate impact were considered properly as rebuttal to prima facie case.

35. Aliens ⇐54.1(4)

Plaintiffs in action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility met preliminary burden of supporting prima facie claim where statistical evidence presented by them disclosed stark pattern of discrimination.

36. Aliens ⇐54.1(2)

In action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility, ultimate burden of proving intentional discrimination by preponderance of evidence was upon plaintiffs.

37. Aliens ⇐54.1(4)

In action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility, Government failed to rebut plaintiffs' evidence of discrimination.

38. Civil Rights ⇐13.13(2)
Constitutional Law ⇐211(1)

Nonstatistical evidence of discriminatory intent of allegedly discriminatory administrative action generally is valuable if it establishes ongoing pattern of discrimination against plaintiff class.

39. Aliens ⇐54.1(3)

Federal district court in action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility erroneously disregarded record evidence relating to historical background, procedural and substantive departures and administration history.

40. Civil Rights ⇐13.12(3)
Constitutional Law ⇐211(1)

In evaluating evidence of historical background in action challenging allegedly discriminatory administrative action, issue is not whether discriminatory action is continuation of former policy, but whether plaintiffs are able to introduce sufficient evidence of past discrimination against class to support inference that current disparate impact too is result of discriminatory intent.

41. Aliens ⇐53.9

In action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility, departure from normal procedural sequence of exclusion adjudication to which plaintiff class members were subject permitted inference of discriminatory intent, although fact that Executive Branch dealt in unique way with immigration problem which gave rise to litigation at issue would not, alone, suggest discriminatory intent toward plaintiffs.

42. Aliens ⇐54.1(4)

Without evidence of similar mistreatment of other immigrant groups, federal district court in action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility had no factual basis for finding that practices at issue were directed at others or that they would be directed to others who were similarly situated.

43. Civil Rights ⇐13.13(1)

In discrimination cases, inference arising if binomial analysis shows that actual result differs significantly from expected result measured by standard deviation is that intentional discrimination is responsible "unspecified force."

44. Civil Rights ⇐13.13(2)

Binomial analysis concerning alleged discrimination may be appropriate in nonrandom situation.

45. Civil Rights ⇐13.13(3)

Plaintiffs challenging allegedly discriminatory administrative action may prove prima facie case without accounting for qualifications when statistical impact is sufficiently glaring.

46. Civil Rights ⇐13.13(2)

Allowing proof of prima facie case of discriminatory administrative action with glaring statistics does not unduly burden defendant; defendant, in rebuttal, can prove unaccounted-for qualifications, thereby undermining plaintiff's case.

47. Aliens ⇐54.1(4)

In action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility, publication by Immigration and Naturalization Service of "Detention Policy Guidelines in Exclusion Cases" in December, 1981 was insufficient to prove policy implemented in fact in early spring of 1981.

48. Civil Rights ⇐13.13(3)

Rejecting well-supported claim of discrimination regarding administrative action on basis of vaguely asserted and ill-defined qualifications represents clear error of law and fact.

49. Civil Rights ⇐13.13(3)

In context of action challenging allegedly discriminatory administrative action, testimony alone is insufficient to rebut statistical evidence of discrimination where

there is little reason to credit such testimony and record gives rise to serious question as to validity of such testimony; in such situation, testimony must be supported by proof.

50. Aliens ⇐54.1(4)

Where Government in action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility declined to offer as witness any individual who could explain or demonstrate exactly which factors were considered in granting parole, Government failed to demonstrate that parole decisions were made in nondiscriminatory manner.

51. Civil Rights ⇐13.13(1)

In action challenging allegedly discriminatory administrative action, shifting burden to government to establish special qualifications is appropriate when data necessary to evaluate alleged qualifications is uniquely in government's possession and when plaintiffs have requested and not received necessary data.

52. Evidence ⇐75

As general rule, Court of Appeals will not penalize one party for failing to explain or present data uniquely in possession of the other.

53. Civil Rights ⇐13.13(3)

In action challenging Government's allegedly discriminatory administrative action, it was error to hold plaintiffs responsible for any failings of data where almost all data analyzed by plaintiffs' expert came from Government in response to discovery requests and such data for most part was lacking entirely in information sufficient to permit qualification analysis.

54. Aliens ⇐53.9

Federal district court in action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility erred in finding that apparent disparate impact on plaintiffs could be explained "on grounds other than race and/or national origin" where arguments advanced by Government to explain disparate impact of policy were largely irrelevant.

55. Aliens ⇐54.1(4)

"Prima facie" case for asylum differs from grant of asylum based on evidence.

56. Aliens ⇐54.1(4)

In action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility, Government's case consisting of nothing but "mere protestation" and "arguments of counsel" did not constitute rebuttal of prima facie case of discrimination proven by plaintiffs.

57. Administrative Law and Procedure ⇐392

Rule-making requirements of Administrative Procedure Act provide minimum, not maximum, to administrative procedure; they serve crucial purpose in guiding administrative discretion. 5 U.S.C.A. §§ 551 et seq., 553.

58. Habeas Corpus ⇐13

Alien in custody subject to exclusion has only one means of available review, action for habeas corpus in district court following exhaustion of all administrative remedies. Immigration and Nationality Act, § 106, as amended, 8 U.S.C.A. § 1105a.

59. Administrative Law and Procedure ⇐651

Court of Appeals presumes judicial review of agency action unless review explicitly is precluded by statute.

60. Constitutional Law ⇐277

Although procedure due any individual alien in exclusion is not of constitutional magnitude, character of action changes when it challenges widespread program calculated to deprive entire class of statutory rights; though alien's due process right may only be to that process Congress determined was due, wholesale deprivation of such process by Executive is separate equal protection violation. U.S.C.A. Const. Amend. 5.

61. Aliens ⇐54.3(1)
Habeas Corpus ⇐13

Statute providing that alien against whom final order of exclusion has been made may obtain judicial review of such order by habeas corpus proceedings and not otherwise is inapplicable if asserted claim is unrelated to exclusion hearings. Immigration and Nationality Act, § 106, as amended, 8 U.S.C.A. § 1105a.

62. Federal Civil Procedure ⇐101

Standing is mandatory jurisdictional consideration. U.S.C.A. Const. Art. 3, § 1 et seq.

63. Administrative Law and Procedure ⇐229

Exhaustion is discretionary in federal district court; although as general matter judicial economy and deference to administrative tribunals require plaintiff to pursue all administrative remedies prior to requesting relief in court, circumstances may mitigate against exhaustion in given case.

64. Administrative Law and Procedure ⇐229

"Exhaustion" requires that plaintiffs pursue all available administrative remedies prior to asking court for relief.

See publication Words and Phrases for other judicial constructions and definitions.

65. Administrative Law and Procedure ⇐229

When policies advanced by exhaustion are not served by requiring exhaustion, federal district court may in exercise of its sound discretion excuse exhaustion requirement.

66. Aliens ⇐54.3(1)

Federal district court in action challenging implementation of policy change whereby undocumented aliens were detained at point of entry pending determination of their admissibility did not abuse its discretion in finding that plaintiffs failed to exhaust their administrative remedies for claimed violation of right to be represented by counsel.

67. Aliens ⇐54.2(1)

Since alien uninformed of right to request asylum is denied any opportunity to present asylum claim before district director, right to request asylum from district director does not merge into final order of exclusion.

68. Aliens ⇐54(5)
Habeas Corpus ⇐13

Immigration proceeding before district director is ancillary to, not a part of, administrative proceedings reviewable before Board of Immigration Appeals and on habeas. Immigration and Nationality Act, § 106, as amended, 8 U.S.C.A. § 1105a.

69. Aliens ⇐54(1)

Immigration judge has no authority over, or to remand to, district director.

70. Aliens ⇐53.10(1)

Basis for constitutionally protected right to petition government for political asylum applies equally to excludable and deportable aliens.

71. Aliens ⇐54(2)

Failure to notify alien of right to claim asylum, thereby closing door entirely on process, violates right to present petition for asylum. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C.A. § 1101 et seq.

72. Aliens ⇐54(2)

Where aliens arriving in country unschooled in English and largely in ignorance of American legal system were not notified of right to apply for political asylum, they were denied such right. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C.A. § 1101 et seq.

73. Constitutional Law ⇐82(6)

Determination of proper access regulations regarding undocumented aliens detained at point of entry pending determination of their admissibility requires balancing of government's interest in detention and security against aliens' First Amendment rights. U.S.C.A. Const.Amend. 1.

74. Constitutional Law ⇐90.1(1)

Legal counsel has right to inform aliens in detention of their legal rights when counsel does so as exercise of political speech unaccompanied by expectation of remuneration. U.S.C.A. Const.Amend. 1.

75. Constitutional Law ⇐82(13)

First Amendment rights in prison context remain subject to reasonable restrictions necessitated by requirements of security and management of prison community. U.S.C.A. Const.Amend. 1.

76. Aliens ⇐3

Congress may draw distinctions between classes of aliens; Executive may not do so absent authorization from Congress.

77. Aliens ⇐53

Although Executive, through Immigration and Naturalization Service, has power when properly delegated to fashion such policies as are necessary to protect borders and ensure orderly entrance of aliens, such policies must be administered in nondiscriminatory manner.

Stanley Marcus, U.S. Atty., Miami, Fla., Leon B. Kellner, Asst. U.S. Atty., Robert L. Bombaugh, Atty. Gen., U.S. Dept. of Justice, Rudolph W. Giuliani, Associate Atty. Gen., Washington, D.C., for defendants-appellants, cross-appellees.

Kurzban & Kurzban, Ira J. Kurzban, Nat'l Emerg. Civ. Lib. Foundation and Haitian Refugee Center, Inc., Miami, Fla., Mary Gilmore and Terrence A. Corrigan, New York City, Michael J. Rosen, Miami, Fla., Christopher Keith Hall, New York City, for plaintiffs-appellees, cross-appellants.

Vera Weisz, Haitian Refugee Center, Inc., Miami, Fla., Bruce J. Winick, ACLU Foundation of Fla., Inc., Coral Gables, Fla., Irwin P. Stotsky, Univ. of Miami, School of Law, Coral Gables, Fla., for Haitian Refugee Center.

Kendrick Tucker, Deputy Atty. Gen., Tallahassee, Fla., for intervenor-appellant State of Fla.

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

KRAVITCH, Circuit Judge:

This suit is before us on appeal from an order releasing over one thousand Haitian immigrants held in detention by the United States Government. The government detained the Haitians as part of a stringent immigration program that followed on the heels of the massive Cuban migration during the Mariel boatlift of 1980. Pursuant to the new policy Haitians were detained in camps or prisons pending a final determination of their right to remain in this country, a process that took months, or in some cases over a year.

This is a complicated case. The issues presented are complex. And, it is an involved case. The record on appeal is voluminous. It is a delicate matter as well: the court below noted the extensive publicity this case has received, and the strong feelings with which it is regarded by either side.

[1] The judgment of the court below ordered the release of the detained Haitian immigrants. The district court's opinion stressed one basic principle: although the Executive, in concert with Congress, has wide authority to act to protect our borders, the governing branches must nonetheless act within the letter of the law. Despite our differences with the district court as to many of the individual bases for decision, as well as some particulars of the relief afforded, we concur in the judgment freeing the Haitians, and in that underlying rationale.

I. The Predicate

A. *The Procedural Predicate*

During the week of June 1–5, 1981 the Immigration and Naturalization Service ("INS") held mass "exclusion" hearings for Haitian immigrants to determine whether they were admissible to this country, or

should be deported. Many hearings were held behind locked doors in courtrooms from which counsel attempting to inform the Haitians of their rights were barred. Overwhelming evidence established that Creole translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights. Pursuant to these faulty hearings many Haitians were adjudged excludable from this country, and were subject to deportation.[1]

Although exclusion and the procedures by which exclusion occurred provided initial impetus for this action the issue of detention too was significant. Pursuant to Administration policy many Haitian immigrants were held in detention camps prior to a determination of excludability. Because of procedural difficulties, and the unwillingness of the government to parole those incarcerated, detention frequently continued for months; in some cases for over a year. In response to this situation the Haitian Refugee Center ("HRC") filed this cause in the United States District Court for the Southern District of Florida. Originally filed as a petition for habeas corpus on behalf of those unlawfully excluded from this country, the complaint was subsequently amended to request class certification allowing named plaintiffs to sue on behalf of themselves and a class of Haitian refugees similarly situated. Alleging seven grounds for relief, *inter alia* discrimination in enforcement of Administration policy and rulemaking in contravention of required administrative procedure, plaintiffs sought declaratory relief as to the validity of their claims as well as an injunction against enforcement of the Administration's policy mandating such proceedings and detention. Plaintiffs also sought a stay of deportation for any Haitian excluded pursuant to the challenged procedures and a stay of exclusion hearings for Haitians unrepresented by counsel. Hearings commenced shortly thereafter on preliminary injunctive relief.

On September 30, 1981, in a strongly worded opinion, the district court certified the class. The court found the INS was playing "a human shell game" with the Haitians, moving them around the country to desolate areas without available counsel or communication facilities. The court further found faulty the INS proceedings whereby eleven Haitians were deported; these proceedings included mass hearings, behind closed doors, without counsel or adequate translators. *Louis v. Meissner*, 530 F.Supp. 924, 926–28 (S.D.Fla.1981) ["*Louis I*"]. The court therefore enjoined deportation of, and further exclusion hearings for, class members unrepresented by counsel. The government chose not to appeal the preliminary injunction and requested an immediate trial.

On February 24, 1982, the district court dismissed four of the seven claims in the original complaint on jurisdictional grounds.[2] *Louis v. Meissner*, 532 F.Supp. 881 (S.D.Fla.1982) ["*Louis II*"]. That dismissal, which eliminated many procedural issues, brought to the fore the question of detention. On March 15, 1982, a six-week trial commenced. Three general issues were tried: a claim that the Administration implemented its new immigration policy in violation of the Administrative Procedure Act ["APA"] by failing to engage in notice and comment rulemaking; a claim that the immigration policy was enforced against the Haitians in a discriminatory manner, contravening their fifth amendment equal protection rights, and an issue of first amendment access rights among the Haitians, their attorneys, family and friends.

In a memorandum opinion dated June 18, 1982, *Louis v. Nelson*, 544 F.Supp. 973 (S.D. Fla.) [hereinafter "*Louis III*"], Judge Spellman determined that the government had violated the Administrative Procedure Act;

1. At some stage in the proceedings the government deported eleven Haitians pursuant to procedures they admitted were faulty and not in compliance with law. There is no appeal from an unlawful deportation. 8 U.S.C. § 1105a(c).

2. A number of judges heard different proceedings in this action. The district judge who entered the order enjoining exclusion hearings was not the same judge who eventually rendered judgment on the merits.

consequently he held the detention policy "null and void" and reinstated a prior policy of parole, one he determined "is in full force and effect." Pursuant to the prior policy the court ordered the release of all class members. It further held the plaintiffs had failed to prove their discrimination claim. Finally, the court declined to rule on the access claim, ostensibly because the issue was mooted by the release order.

Following the government's submission of a notice of intention to engage in rulemaking the district court granted a partial stay, the effect of which was to permit detention of aliens who arrived between the date the final judgment was entered and the date the new rules for detention were promulgated. The government appealed the judgment as to rulemaking; plaintiffs cross-appealed the discrimination and access issues, as well as the jurisdictional dismissal of the procedural claims. On July 13, 1982, this court denied the government's emergency motion for a stay pending appeal.

B. *The Factual Predicate*

Haitians first began to appear on our shores in numbers in the early 1970's. Often travelling in small boats barely suited to ocean travel, the Haitians came to America seeking relief from economic oppression, as the government would have it, or to escape political oppression, as plaintiffs assert. By 1981, when the government action giving rise to this lawsuit began, the number of undocumented Haitians living in the south Florida area was estimated at thirty-five thousand.[3]

Although the decade-long influx of undocumented immigrants from the Caribbean basin to south Florida presaged the end of the Administration's permissive attitude toward illegal immigration, an influx in which the Haitians participated, it was the arrival of Cuban immigrants that had the greatest impact. In the spring of 1980 the Mariel boatlift or "Freedom Flotilla" brought some 125,000 Cubans to our shores in a number of weeks. *Louis III*, 544 F.Supp. at 978. In response to this sudden, massive immigration, President Carter appointed a Select Committee on Immigration to examine the country's immigration woes. That committee issued a report in February, 1981 finding that an "immigration crisis" existed in this country. *Louis III* at 979. The "crisis" passed unresolved to the new Administration and in March 1981 President Reagan appointed a special task force to consider solutions. This body included the Secretaries of State, Defense, Transportation, Labor, Commerce, Health and Human Services, and the Director of the Office of Management and Budget. *Id.*

The task force examined several immigration problems, one of which was the number of undocumented aliens unlawfully in this country. Figures gathered by the task force indicated some three to six million aliens had settled here in violation of immigration laws. This massive body, living in constant fear of deportation, oftentimes was exploited by unscrupulous employers. Rather than attempt to apprehend these millions of immigrants, however, the Administration determined to offer a general amnesty to undocumented aliens in this country since 1978. Acting upon a task force recommendation the Administration proposed a special immigrant status to these illegal aliens. *See* 40 Cong. Q. Week-

3. In its statement of facts the government refers to the Haitian immigration as a "massive influx." Because this colors the issues somewhat, we note this characterization is not entirely correct. Over the last ten years some 35,000 to 40,000 Haitians have arrived at our shores. Brief of United States, Statement of Facts, p. 6 (35,000 in ten years); Testimony of Alan C. Nelson, 47 Tr. 1957–58 (45,000–50,000 in 15 years). The Commissioner of the INS testified that as compared to illegal immigrants of the last ten years the 40,000 Haitian figure "is not a very high percentage," especially when compared with the influx of Mexicans, which constitutes the highest percentage. The district court's opinion noted a Task Force statement of "the mass influx of Cubans and Haitians . . .," *Louis III* at 978, but that takes into account the arrival of 125,000 or more Cubans in several months, or three times the total number of Haitian immigrants in a fraction of the time. By almost all accounts it was mass immigration of Cubans that prompted tightening the net in which the Haitians were caught.

ly Report 3097-98 (1982) (S.2222 & H.R. 7357, neither of which has yet been enacted into law, contain "amnesty" provision).

The problem of the continuing influx into Florida remained. In fact, some task force members feared the amnesty program would trigger increased efforts by aliens to immigrate unlawfully, falsify their date of arrival, and claim entitlement to the amnesty status. The task force report proposed several solutions to the problems of unlawful immigration, therefore, including sanctions against those who employ illegal aliens, and amendment of the criminal laws regarding the rendering of assistance to aliens wishing to immigrate.

One particular recommendation adopted by the Administration as part of its new immigration policy gave rise to this suit. As part of the crackdown on unlawful immigration the task force recommended detaining aliens without parole pending a determination of their right to enter the country. The government had not resorted to widespread detention of undocumented aliens since 1954.

C. *The Legal Predicate*

This section bridges the gap between a recommendation of detention and implementation of that policy. In the first part we discuss briefly the constitutional and statutory authority of the political branches over immigration matters, concluding that a policy of detention is within such authority and that Congress may delegate responsibility for detention decisions to the Executive branch. In the second part we review the rights of the Haitian immigrants as "excludable aliens" under the immigration laws, and conclude that although their rights are few, they are entitled to those rights explicitly granted by Congress. Finally, we review the statutory mechanism that grants the Attorney General authority to implement the recommendations of the task force.

1. *Authority of the Governing Branches*

[2-4] We proceed to establish three essential points: (1) that the authority of the political branches over immigration matters and aliens is plenary and knows few bounds, (2) that Congress may, and has chosen to, delegate wide discretionary authority to the Executive to administer immigration matters, and (3) that the Executive's authority is limited by the statutory grant of Congress.

[5, 6] Although the Constitution fails to delegate specifically the power over immigration, the Supreme Court recognized almost a century ago that the political branches have plenary authority over immigration matters as an inherent concomitant of national sovereignty. *Mahler v. Eby*, 264 U.S. 32, 41, 44 S.Ct. 283, 287, 68 L.Ed. 549, 555 (1924); *Ekiu v. United States*, 142 U.S. 651, 659, 12 S.Ct. 336, 338, 35 L.Ed. 1146, 1149 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 604, 9 S.Ct. 623, 629, 32 L.Ed. 1068, 1075 (1889) ["the Chinese Exclusion Case"]. Protection of the national borders is within the authority of the national government, inferred from the enumerated foreign commerce, treaty, war, and naturalization powers. *The Chinese Exclusion Case*, 130 U.S. at 604, 9 S.Ct. at 629, 32 L.Ed. at 1075. *See generally* Gordon & Rosenfeld, *Immigration Law and Procedure* § 1.5a (rev. 1982) [hereinafter "*Gordon*"]. Authority over the national borders encompasses all immigration matters, including exclusion of aliens. *Gordon* § 1.5a.

[7] Congress and the Executive branch share the immigration power. *Ekiu*, 142 U.S. at 659, 12 S.Ct. at 338, 35 L.Ed. at 1149. It may be exercised by the Executive and the Senate through the execution of treaties, *id.*, through the legislative powers of Congress, *id.*; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317, 324 (1950), and in part by the Executive branch acting alone, as a function of its plenary authority over foreign relations. *Knauff v. Shaughnessy*, 338 U.S. at 542, 70 S.Ct. at 312, 94 L.Ed. at 324; *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936). "Normally Congress supplies the conditions of the privilege

of entry into the United States. But because the power of exclusion of aliens is also inherent in the Executive department of the sovereign, Congress may in broad terms authorize the Executive to exercise the power, ..." *Knauff v. Shaughnessy*, 338 U.S. at 542, 70 S.Ct. at 312, 94 L.Ed. at 324.

Congress traditionally exercises authority over matters of immigration and exclusion through passage of immigration legislation. *See generally Gordon* § 1.2d–1.4g (detailing history of immigration laws). The most recent comprehensive piece of such legislation is the Immigration and Naturalization Act of 1952 as amended and codified at 8 U.S.C. [hereinafter "the 1952 Act"]. The 1952 Act is the primary focus of this suit; through this vehicle Congress transferred great authority over immigration to the Executive branch, the principal actor being the Attorney General. Section 1103(a) of the Act provides:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as [power is delegated to other actors] . . . .

The Act further provides: "[t]hat determination and ruling by the Attorney General with respect to all questions of law [under the Act] shall be controlling." *Id.* The Attorney General is given authority to delegate his powers under the Act to other employees of the Immigration and Naturalization Service or the Department of Justice. *Id.*

The Act vests in the Attorney General enormous statutory and discretionary authority over the procedures and policies of immigration. *See* 8 U.S.C. § 1103 (powers and duties of the Attorney General and Commissioner) (rulings of Attorney General controlling on questions of law; has control over employees of Service; may delegate any duties in his discretion; prescribes regulations, forms and bond; controls borders and appoints employees in his discretion for that purpose). This grant of discretionary authority ranks among the broadest of delegations by Congress to a government officer. *Cf.* K. Davis, Administrative Law Treatise § 8.10 (2d ed. 1979) [hereinafter "*Davis*"] (1952 Act replete with provisions allowing Attorney General to, in his discretion, take action concerning an alien). The authority further is delegated from the Attorney General to the Commissioner of the INS, as well as to regional and district directors. *Id. Gordon* § 1.7b. Even on the lowest rungs of the immigration service decisionmaking discretion is exercised in the name of the Attorney General.[4] *See Davis* § 8.10 (Attorney General's discretion exercised by the seven thousand employees of INS); *Gordon* § 1.7b (Attorney General may delegate any of his powers or duties to any officer or employee of INS).

Although the wide Congressional grants of discretionary authority embodied in the 1952 Act are permissible in the face of the inherent Executive function to manage foreign affairs, *see supra*, the Executive's ability to act in the absence of a Congressional grant of authority is limited. *Mahler v. Eby*, 264 U.S. 32, 45, 44 S.Ct. 283, 288, 68 L.Ed. 549, 557 (1924); *cf. Knauff v. Shaughnessy*, 338 U.S. at 542, 70 S.Ct. at 312, 94 L.Ed. at 324 (executive officers may be entrusted in broad terms to carry out Congressional intent). However, the joint authority of Congress and the Executive over immigration, and particularly over aliens seeking admission to this country, is extremely broad. *Gordon* § 1.5a; *Knauff v. Shaughnessy*, 338 U.S. at 542–44, 70 S.Ct. at 312–13, 94 L.Ed. at 324–35.

2. *Rights of the Alien*

[8, 9] Legal "rights" of an alien vary with his "status" under the 1952 Act. The determinative factor is whether the alien

4. The Attorney General is statutorily authorized to confer on any employee of the United States the authority and duties of an INS employee. 8 U.S.C. § 1103(a); *Gordon* § 1.7b. While this far-reaching a delegation did not arise in this suit, attenuated delegation of unguided discretionary authority certainly contributed to the misadministration of government policy. *See infra* at 1473–1474 (detailing lack of guidance of parole decisions).

has effected an "entry" into this country. *Leng May Ma v. Barber*, 357 U.S. 185, 188, 78 S.Ct. 1072, 1074, 2 L.Ed.2d 1246, 1248–49 (1958) (law distinguishes between aliens on border seeking to enter and aliens in country, whether legally or not); *Barber v. Gonzales*, 347 U.S. 637, 640, 74 S.Ct. 822, 824, 98 L.Ed. 1009, 1012–13 (1954) (whether individual is deportable depends on "entry" status under Act). *Compare* 8 U.S.C. §§ 1221–1230 (rights of aliens seeking to enter) *with* 8 U.S.C. §§ 1251–54 (rights of aliens in deportation). As a general rule aliens who have effected an entry, whether lawfully or not, are accorded the full panoply of traditional due process rights. *See Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956, 962 (1953) [hereinafter "*Mezei*"]. As a function of plenary Congressional authority, however, aliens seeking to enter this country, as opposed to those who have entered, find much less process due an adjudication of their right of entry.[5]

In several cases decided in the early 1950's the Supreme Court emphasized the limited rights of an alien seeking entry. *See Mezei*, *supra*, 345 U.S. at 212, 73 S.Ct. at 629, 97 L.Ed. at 962; *Knauff v. Shaughnessy*, *supra*, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1950). In *Mezei* the Court held that an alien's constitutional and statutory rights were not violated when he was excluded from the United States upon order of the Attorney General for security reasons without a hearing or disclosure of evidence, even when that exclusion resulted in indefinite detention on Ellis Island because all efforts to deport him had failed. The Court noted that an alien who has effected entry is entitled to proceedings conforming to traditional due process. "But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" (citation omitted).

Congress has not left the excludable alien without rights, however. In the 1952 Act Congress provides a process for determination of an alien's claim of admission; although limited that process affords the alien certain traditional due process protections. An alien seeking entry is entitled to a determination of the validity of his claim in an exclusion hearing before an immigration judge (equivalent to an administrative law judge). At the hearing an alien has the right to be confronted with, and combat, the evidence against him, to examine and cross-examine witnesses, and to present evidence. *See generally* 8 C.F.R. § 236.2 (hearing procedures); *Gordon* § 3.19a & b (same). Further, should the immigration judge decide the alien is not entitled to entry, that decision may be appealed to the Board of Immigration Appeals acting as surrogate for the Attorney General, 8 U.S.C. § 1226(b); 8 C.F.R. § 236.7, and finally the alien may challenge the order of deportation in the appropriate United States District Court by way of a writ of habeas corpus, 8 U.S.C. § 1105a(b).

Accompanying the statutory right to an exclusion proceeding are several incidental statutory entitlements. For example, any alien arriving at our shores may file an application for asylum with the district director or the immigration judge. 8 C.F.R. § 208.3. Although a number of practices incidental to the exclusion hearing are here challenged, one particular concomitant power—the parole power of the Attorney General—provides the primary basis for this litigation.

3. *The Attorney General's Parole Authority*

Because entry status is determinative of the procedure afforded an alien, aliens not clearly admissible are detained "at the bor-

5. "The irony of this distinction is that deportable aliens, many of whom entered this country surreptitiously, are given more rights under the law than excludable aliens who present themselves to immigration. The practical effect of this is to encourage those who attempt to sneak across the border because they are rewarded with greater rights than those aliens who attempt to comply with our laws." *Louis III* at 977 (footnote omitted).

der" by INS pending an exclusion hearing. 8 U.S.C. § 1225(b). This detention permits maintenance of the "no entry" status. Section 1225(b) provides in pertinent part:

> Every alien ..., who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land *shall be detained for further inquiry.*

(emphasis supplied). Parole is a means, however, of allowing an alien into the country temporarily pending determination of admissibility in an exclusion hearing, without destroying the fiction of "no entry" status. To this effect 8 U.S.C. § 1182(d)(5)(A) provides in pertinent part:

> The Attorney General *may ... in his discretion parole* into the United States temporarily *under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest* any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien ....

(emphasis supplied).

Exercise of the parole authority has varied. Prior to 1954 parole was rarely granted. After 1954, until the present time, however, this country maintained a policy of ready parole of aliens seeking entry into the country. As a result of the new policy announced by the Administration in 1981 the exercise of parole power has tightened again. *See infra* at 1468–1469 (discussion of old policy).

D. *The Policy Predicate*

Although the statutory scheme provides for detention and parole, enforcement of the statute has varied widely since its enactment, depending upon the "policy" of the current Administration. The policy here at issue, adopted as a result of the recommendations of the Task Force on Immigration, was announced in July of 1981 and inaugurated the Reagan Administration's program to "enforce" the immigration laws in order to gain control over the influx of undocumented immigrants. Count II of plaintiffs' complaint alleged the Administration initiated its policy without following procedures mandated by the Administrative Procedure Act. Count VII alleged discriminatory application of the policy.

Yet, after weeks of trial and pages of exhibits and testimony, no clear picture of the entire policy emerged. It is apparent the policy requires strict adherence to the "detention" language of § 235 of the 1952 Act, 8 U.S.C. § 1225(b), and a concomitant tightening of the discretionary parole authority in § 212 of the 1952 Act, 8 U.S.C. § 1182(d)(5)(A). Any further effort to define the policy, however, is futile on the basis of the record before us. Whenever plaintiffs offered a document purporting to establish the policy the government denied its relevance, no doubt because the document inevitably was captioned "Haitian Program," which would constitute irresistible proof of discriminatory motive. Whenever the government witnesses sought to explain the policy the plaintiffs demurred on the ground it was nowhere in writing. No witnesses described the "policy" similarly. *See Louis III* at 981, n. 22.

The resolution of this action requires an understanding of what the evidence at trial showed, or failed to show, about the policy. The district court made extensive findings, no simple task given the state of the evidence. We have reviewed those findings and carefully examined the evidence in order to determine whether that evidence supports the conclusions of the court below. Although we are in substantial agreement with the district court, which noted the failings of the evidence, we believe the court did not always apply its factual determinations in a consistent manner. In order to explain cogently where we agree and differ with the court below, we set out in full our understanding of what the evidence did, and did not, support in regard to the government's policy.

1. *The Old Policy*

Parole of aliens pending an exclusion hearing is a relatively recent phenomenon. Prior to 1954 it was INS policy to detain

almost all aliens at the port of entry pending a determination of their admissibility. Gordon testimony, 38 Tr. 115, 123 *et seq*; 32 Int.Rel. No. 12 (March 27, 1955).[6] Large detention centers existed for this purpose at San Francisco, California and Ellis Island, New York. In 1954, however, the new Commissioner of the INS, General Swing, decided that this policy of mass detention was inhumane and unnecessary. General Swing consulted with the Attorney General, and they determined to close Ellis Island. At that time the policy changed, and aliens were paroled freely into the United States pending a determination of admissibility. There were two exceptions to the rule of general parole: when there was a likelihood of the alien absconding, and when the alien's "freedom of movement could be adverse to the national security or the public safety." 32 Int.Rel. No. 12 (March 22, 1954). The parole policy was flexible in that reasonable restrictions could be imposed by INS to insure availability of the alien. *Id.; see also Leng May Ma v. Barber*, 357 U.S. at 190, 78 S.Ct. at 1075, 2 L.Ed.2d at 1250 (physical detention now exception not rule).

The 1954 closure of the Ellis Island immigration center was accompanied by announcements that detention of undocumented aliens in exclusion was to cease, except in "but a few cases" where the alien was deemed "likely to abscond or those whose freedom of movement could be adverse to the national security or the public safety." *See* Address of the Attorney General, Nov. 11, 1954, reported in 32 Int.Rel. No. 12, "New Detention Policy of the Immigration and Naturalization Service." The Attorney General acknowledged the general parole program as a change of policy. The Supreme Court hailed the parole policy as one that exhibited the "humane qualities of an enlightened civilization," *Leng May Ma v. Barber*, 357 U.S. at 190, 78 S.Ct. at 1075, 2 L.Ed.2d at 1250.

The court below acknowledged the post-1954 general parole policy. *See Louis III* p. 980 n. 18. We concur in its findings in this regard. This policy (prior to the recent change established at trial), [hereinafter "old policy"], was one of general parole. Detention was rare, and limited to those aliens who were likely to abscond, or who posed a threat to the national security.

2. *The Policy Change*

[16] On July 30, 1981 the President of the United States issued a statement emphasizing the need to "establish control over immigration" to guarantee that foreigners are admitted to this country "in a controlled and orderly fashion." That same morning the Attorney General of the United States addressed a joint subcommittee of Congress testifying that "[w]e have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." Testimony of William French Smith, Attorney General, before the Senate Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration, Refugees, and International Law, July 31, 1981, at 1 [hereinafter "*French Testimony*"]. Accordingly, the Attorney General announced the Administration's comprehensive plan to combat the country's immigration problems. Part of this program was a return to a policy of detention of undocumented aliens.

At trial, Administration officials could not agree on whether the policy actually changed following the President's pronouncement. Alan C. Nelson, former Deputy Commissioner, INS, who became Commissioner in January of 1982, maintained that no change in policy had occurred. Rather, increased "enforcement" of the detention statute resulted from the acquisition of detention space. Nelson stated: "plaintiffs' claim that INS has recently changed its detention policy by restricting the use of parole is not founded upon or supported by any change in the applicable statute or regulations." Plaintiff's exhibit ["Px"] 71C (Declaration of Alan C. Nelson, and accompanying affidavit). Joe Hower-

6. Interpreter Releases, published by the Common Council for American Unity, provides information o . "Immigration, Naturalization and Related Problems."

ton, the District Director of INS District VI in Miami also claimed the shift to detention was based only on the increased availability of detention space. 48 Tr. 2186. He disclaimed knowledge of, and testified he never received notice of, a change in policy following the President's announcement on July 30, 1981. *Id.* at 2211.[7]

Despite the above testimony to the contrary, the evidence clearly indicates that the Administration viewed its announcement on July 31, 1981 as a change in direction of immigration policy. On the same day the President issued his statement both the Attorney General of the United States, William French Smith, and the then Commissioner of the INS, Doris Meissner, testified before Congressional committees. Smith, on behalf of the Administration, proposed a legislative package to reform many immigration laws. One specific request was for $35 million for increased detention space "to detain temporarily illegal aliens upon arrival pending exclusion or granting of asylum." *French Testimony* at 12. Detention was necessary as part of a program to "deter the continuing arrival of illegal undocumented aliens to our shores." Meissner described the litany of evils that led to the current immigration problem, then explained the new policy: "[t]herefore, in the future, undocumented aliens ... will be placed in administrative detention pending the determination of their admissibility." Testimony of Doris M. Meissner, Commissioner, INS, before the Senate Committee on the Judiciary, Subcommittee on Immigration & Refugee Policy, July 31, 1981, at 2, 9 [hereinafter *"Meissner Testimony"*]. When deposed for this action Ms. Meissner was asked "[b]ut, it is your testimony if I understand it, that there was a change in policy and practice as of July 31, 1981," to which she replied, "[t]hat is right." Deposition of Doris Meissner, September 1, 1981 [hereinafter Meissner Dep.] at 7.

The district court reviewed this evidence and determined there had been a change in policy. It stated that "on July 31, 1981, the President issued a statement on the immigration policy of this nation." *Louis III* at 980. The district court repeatedly referred to the policy as the "new policy," and based its Administrative Procedure Act ruling on a change in policy [hereinafter "policy change"]. This finding, that there was a change in policy, is amply supported by the evidence; on July 31, 1981 the immigration policy changed from what was instituted in 1954 when Ellis Island was closed, (the "old policy") to a new program, described *infra* (the "new policy").

3. *The New Policy*

Evidence concerning the substance of the Administration's "new policy" reveals the particulars of the new policy never were developed fully. Immigration inspectors were left to exercise discretion in an unguided fashion with the result that many individuals were deprived of their liberty in an arbitrary manner.

The Administration's announcement of its new policy on July 30, 1982, was accompanied by much heraldry, but little substance. Although, the government was going to curb the waves of refugees arriving upon the shores of south Florida, it was not at all clear how this was to be accomplished within the framework of the immigration laws. The President's initial policy statement did not mention detention. He spoke of "sudden influxes of foreigners," and the need to "establish control over immigration" to ensure aliens are admitted, or not admitted, in a "controlled and orderly fashion." In this regard the President enumerated a number of "steps," none of which was detention. The statement concluded, "[t]he steps we take to further these objectives, however, must also be consistent with

7. Were it not for clear evidence of the "old policy" a plausible explanation for Nelson's and Howerton's disagreement with the rest of the Administration might be that the new policy involved nothing more than increasing detention space. This explanation fails however in the face of overwhelming evidence that detention after 1954 was to be "the exception, not the rule." *Leng May Ma v. Barber*, 357 U.S. at 190, 78 S.Ct. at 1075, 2 L.Ed.2d at 1250.

our values of individual privacy and freedom."

The Attorney General of the United States, charged by statute with regulation of immigration, testified before Congress on the day the President announced the new policy. Although he did mention detention, "... [t]he Administration will seek additional resources for the construction of permanent facilities in which to house undocumented aliens temporarily until their eligibility for admission can be determined," he offered no specifics as to parole. His only guideline was evenhanded treatment. "By treating those who arrive by sea in the same way we have long treated those who arrive over our land borders, our policy will be evenhanded, and we can avoid the severe community disruptions that result from large-scale migrations." *French Testimony* at 15.[8]

Three highly placed Administration officials gave insight into the specifics of the new policy. Doris Meissner, the former Commissioner of the INS testified before Congress, and was deposed for this action. Rudolph W. Guiliani, Associate Attorney General, the third ranking official at the Department of Justice, bearing primary responsibility for immigration, testified at trial. Commissioner Nelson also discussed the specifics in his trial testimony. The officials contradicted one another several times, and did not agree on the substance of the policy.[9]

This evidence, and lack thereof, indicates the disarray with which the Administration

8. What the Attorney General could have meant by this remark is unclear. Evidence at trial showed that over 200,000 Mexicans arrive here every year, undetected, and remain in the country. See Px71a (memorandum to President's Task Force from Hiller) (19 May 1981). Additionally, the new policy as to Mexicans was to have a temporary worker permit for some of them, an advantage not at all available to Haitians. See *French testimony* at 8 (proposed temporary worker program for Mexican nationals). Further, government witnesses stated Mexicans apprehended at the border choose to voluntarily return to Mexico (perhaps to try again), which is not universally the case with the Haitians, so they hardly can be equated. *See Louis III* at 1001 (voluntary withdrawal of Mexicans).

9. For example, Guiliani testified that parole was appropriate for "exigent circumstances, humanitarian reasons," 49 Tr. 2270 but admitted "I'm not sure I know all the categories of parole." *Id.* at 2322. (Guiliani in fact failed initially to distinguish detention from parole, claiming § 235 of the 1952 Act required detention unless there was a colorable right to enter, or unless one of the exceptions for "exigent circumstances, humanitarian reasons" was met. 49 Tr. 2269–70. Section 235, of course, contains no exceptions). Nelson's testimony did not differ significantly from Guiliani's. He stated parole was available for "emergency reasons or public policy reasons and this situation where there might be medical or family reunification considerations—." 47 Tr. 1887. (Nelson may have meant "emergent reasons." 8 U.S.C. § 1182 specifically provides for discretionary parole for "emergent reasons or for reasons deemed strictly in the public interest"). Neither the testimony of Nelson, nor that of Guiliani, explained the policy in any depth, however.

Commissioner Nelson's testimony conflicted directly with that of his predecessor, Commissioner Meissner. Meissner testified that although not the sole factor, an alien would be subject to release if he established a prima facie case for asylum, regardless of document status. Meissner Dep. at 5, 9; *Meissner testimony* at 9. Nelson disagreed. At trial he stated a valid claim for asylum would not justify avoiding detention if documents were fraudulent. 47 Tr. 1900.

Fortunately, Meissner's testimony, both before Congress and in her deposition, was forthright enough to allow us to understand the basic policy. Before Congress she stated:

> Therefore, in the future, undocumented aliens arriving in the United States who do not choose to depart voluntarily will be placed in administrative detention pending the determination of their admissibility. The only exceptions will be those who have prima facie claims for asylum or legal immigration status, or who have close relatives residing legally in the United States.

Meissner testimony at 9. On another date she made clear the new policy was "really quite the opposite" of the old. Meissner Dep. at 5.

Of greatest import, however, was Meissner's candor. On September 1, 1981, six weeks after the Administration announced its new policy, she admitted the policy was not being applied uniformly, time and time again admitted these were new procedures not fully developed, and stated: "we are just pulling this all together now to be certain that it is uniform *because some of these things, as you know, have developed along different streams.*" Meissner Dep. at 8 (emphasis supplied).

pursued its new policy.[10] The district court generally took a similar view of the facts. It stated, in a section entitled "policy change,"

> Part of the new immigration program approved by the President called for more restrictive use of parole and increased use of detention. However, the Task Force's proposal in this area, and the statute on which they relied, did not indicate to those who had to administer the new policy which excludable aliens were to be detained. Justice Department and INS personnel were given the responsibility to develop the specific aspects of this plan.
>
> The people in charge of drafting the detention guidelines were cognizant of the fact that the new policy was not applicable to all excludable aliens. INS never intended to physically incarcerate persons who complied with the prescribed procedures for admission but were excludable on minor, technical grounds such as a clerical error on their visa. The policy was designed to deal with another Mariel type situation, regardless of the nationality or number of the arriving aliens. Therefore, the guidelines for detention had to reflect the perceived characteristics such a group of aliens would have. The problem was isolating these characteristics and incorporating them into guidelines that were capable of being objectively applied in individual cases.
>
> The President did not specify whether the development of specific detention and parole criteria was to be accomplished internally by INS or through a rulemaking procedure in which the public could participate. *INS elected to do neither.* They admitted to the Court that they made a conscious decision not to promulgate a rule pursuant to the Administrative Procedure Act. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission.

(emphasis in original).

> *Defendants can point to no operating instruction, internal memorandum or other document that completely reflects the official detention policy. Consequently, the Court cannot precisely define the criteria for detention any better than the Government's witnesses articulated them.* However, the general theme that emerges from the evidence is that aliens are to be detained unless and until they establish to INS' satisfaction a prima facie claim for admission. Within this framework, the District Director had no discretion to grant deferred inspection to Haitians arriving aboard non-signatory carriers without first placing them in detention.

Louis III at 980–81 (emphasis supplied).[11]

In its determination that the new policy never was promulgated or set out in guide-

10. A sample of the conflicting testimony appears, *supra* n. 9.

11. The distinction between criteria for detention and criteria for parole is blurred throughout the trial. The district court attempted to eliminate the confusion, noting:

> In referring to 'criteria for detention' the Court means those factors that would be considered by the immigration inspector in determining whether an excludable alien should be given a deferred inspection or placed in detention. Parole criteria are factors to be considered in determining whether an alien in detention should be released.

Louis III at 981 n. 23. The district court's opinion indicates, however, that the Administration failed to develop criteria for either parole or detention. *Id.* at 981 (President failed to specify whether detention and parole criteria were to be developed internally or through rulemaking; "INS elected to do neither"). That is why we cite as error the requirement of the court below that plaintiffs bear the burden of including in their statistics certain parole criteria. There is no basis in the record for identifying any specific parole criteria. The testimony is contradictory as to what the criteria were, and fails to show that *any* criteria were provided to those enforcing the policy.

One further point bears notice. The district court stated in the textual quote "the District Director had no discretion to grant deferred inspection to Haitians arriving aboard non-signatory carriers without placing them in detention." Though not at issue on appeal, the sig-

lines the district court was correct. That evidence amply supports that determination. In its determination that the record provided no more than a general sense of the criteria for parole and detention the court was likewise correct. The evidence shows that the new policy announced in July, 1981, was never more than a general plan because INS and the Department of Justice failed to follow through with implementing regulations or guidelines.

4. *Unguided Discretion—Implementation of the Policy*

The most significant and telling testimony was that dealing with the transfer of authority to those responsible for implementing the new policy. The testimony indicates no one in the chain of command from the Attorney General to the immigration officers at Krome North, where the Haitians were detained, admitted to ever receiving or giving guidance as to who should be free and who should be incarcerated.

Guiliani, the Associate Attorney General, testified that parole decisions were to be made on a case-by-case basis. 49 Tr. 2318. He declined to answer specific hypotheticals based on individual factors because he believed there should be no general rule, but a careful consideration of all the facts. *Id.* at 2317–2326. He did state that if the policy were being applied in a discriminatory manner, that was contrary to the intent of the Attorney General, and that the person who is doing it "should be reprimanded or dismissed, maybe." *Id.* at 2343.

Nelson, who followed Meissner as the Commissioner of INS, testified that district directors have primary responsibility for parole subject to general INS policy. 47 Tr. 1882. He adhered staunchly to the view that the district director, and not employees under him, should be responsible for the exercise of discretion in parole, subject to general guidelines, *id.* at 1968. Admitting that an Immigration Inspector might make the initial determination, Nelson nonetheless insisted:

> "the basic responsibility is in the district director. Certainly he would not delegate that across the board. The person on the scene such as the inspector would obviously advise the district director on various issues which would lead to the district director's determination.

Id. at 1967. Disclaiming knowledge of any specific case, Nelson testified that if discrimination in detention and parole was occurring, "I would very promptly get personal knowledge of that allegation." *Id.* at 1971–72.

Joe Howerton, the District Director in Miami and thus, according to Nelson and Guiliani, ultimately responsible for Haitian parole, testified that he was familiar with the general criteria as to parole, but because parole was a matter of discretion on

nificance of this statement relates to one government formulation of its policy, *i.e.*, that it only applied to those arriving aboard "non-signatory" carriers. This formulation, an attempt to distinguish the arriving Haitians from other illegal immigrants, suffers two difficulties.

First, it is unsupported by any evidence. One considerable body of statistical data employed by plaintiffs was extracted from the airport logs in District VI. Airlines are signatory carriers. As the detention policy clearly was being enforced at the airport, the "non-signatory" formulation can have no merit.

Second, as a constitutional matter the government's suggestion of this formulation is further evidence of intentional discrimination. Many immigrants enter this country illegally; almost none save the Cubans and Haitians arrive by "non-signatory" carriers. Some aliens surreptitiously cross the border on foot. Others arrive aboard signatory carriers with false or fraudulent documents. The small unregistered boats ("non-signatory carriers") in which the Haitians arrive, however, according to the government formulation, were singled out for special treatment.

Though this case never reached the examination of a rational reason for the discriminatory treatment, because plaintiffs' prima facie case was unrebutted, some government witnesses suggested the "signatory"/"non-signatory" distinction was to prevent another Mariel boatlift. The effect of the line-drawing suggested by some, however, is to deter with one narrowly formulated rule the immigration of aliens we do not wish to have enter, while treating quite differently other classes of equally "illegal" immigrants.

the part of the person granting parole, he "could not attest to [the criteria] in any individual case." 48 Tr. 2159. In his deposition he testified he had "delegated down" his authority. Howerton Dep. at 12. At trial he said he had delegated his parole authority to his assistant director Alan MacAtee, 48 Tr. 2156, then under cross-examination admitted he had to assume MacAtee had further delegated the authority to the people at the airport because MacAtee was not at the airport, and that was where parole occurred. *Id.* at 2157. Parole authority at Krome, where many Haitians were detained, was delegated to Mr. Leonard Rowland, and Howerton was unaware if there were further subdelegations. He did state he never received guidelines as to parole after July 30, 1981 and denied there was a policy change other than in detention space. *Id.* at 2180–90. As to the Presidential announcement on July 30, 1981, Howerton stated "many people continue to make announcements but that doesn't necessarily reflect a policy change." Howerton Dep. at 19.

Rowland, to whom Howerton's parole authority at Krome was delegated, was deposed prior to trial. Rowland admitted he had not personally reviewed each individual case, Rowland Dep. at 86. Nor did he ask anyone else to review each case for parole. *Id.* at 96. Instead, he had his employees review files to see if everything generally was in order, and assumed they would let him know if in the course of file maintenance an appropriate case for parole presented itself. *Id.* at 89–90.[12]

Although the district court did not dwell on this delegation, or lack of it, and lack of communication of the policy, Judge Spellman did note "inconsistencies between what the government witnesses said the policy was and the policy their subordinates were carrying out." These inconsistencies the court attributed to "the absence of guidelines for detention and parole." *Louis III* at 981 n. 24 (describing 15 year old boy in detention, separated from family in community).

In litigation that centers around a complex change in policy we find it significant that INS inspectors were authorized to perform the task of discretionary parole with a complete lack of guidance. It is clear no one knew exactly what the policy was, and no one in authority attempted to supervise the exercise of discretion under the new policy. Not surprisingly, the discretion was exercised with harsh results.

II. The Administrative Procedure Act

[11] Count Two of the Haitian Refugee Center's complaint alleged the Administration's shift to the new policy was a "rule" within the meaning of § 551(4) of the Administrative Procedure Act ("APA"), and that the rule was established unlawfully because the Administration failed to comply with the procedural safeguards of 5 U.S.C. § 553(b) & (c). APA § 553 requires that an agency follow certain rulemaking procedures whenever it promulgates a "rule," unless a statutory exception to the rulemaking requirement applies. *See* 5 U.S.C. § 553(b)(A) & (B) (exempt rules); *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C.Cir.1978) [hereinafter "*Guardian Federal*"]. Except in those instances when "on the record" rulemaking is required by statute, 5 U.S.C. § 553(c), an agency engaging in rulemaking must follow the "notice and comment" rulemaking provisions of APA § 553(b) & (c), which require that an agency provide notice of a proposed rule in the *Federal Register*, and afford an opportunity for interested persons to present their views.

[12] The court below found the new policy was a rule within the meaning of APA

12. A case in point is Marie Puzo, an immigration inspector sent down by the eastern office in Burlington, Vermont, to help at Krome. Rowland Dep. at 88. Within the framework here presented Puzo was one of the immigration staff in whose hands the liberty of the Haitians ultimately rested. Rowland did not know, but assumed she studiously reviewed each file and in the course of her general review would let him know if she found a case for parole. She was a "very competent officer," *id.* at 90, and did tell him on two or three occasions when a case for parole presented itself. *Id.* at 90–91.

§ 551(4), *Louis III* at 998, and the government conceded that the policy was instituted without employing rulemaking procedures, *id.* at 998. The district court therefore held invalid the new policy, and ordered a return to the old policy, under which parole generally was granted. Then, relying on the old policy, the district court ordered release of the Haitian refugees incarcerated by the federal government.

On appeal the government argues first that the policy change was not a rule. APA § 551(4) defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ...." The district court applied this definition to the new policy and found the change in policy was "clearly" a rule. We conclude the district court was correct; careful analysis of the APA shows the government's argument to be without merit.

A. *Rulemaking*

[13] The APA establishes procedures governing the conduct of administrative agencies. The structural approach of the APA is to divide all the world of administrative action into two categories; an agency either issues an "order" by "adjudication" or a "rule" by "rulemaking." *Guardian Federal*, *supra*, 589 F.2d at 668; *Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System*, 516 F.2d 1206, 1215 & n. 25 (D.C. Cir.1975); *see U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act* 12–13 (1947) [hereinafter "Attorney General's Manual"] (setting forth distinction between rulemaking and adjudication; definition of adjudication largely residual one based on rulemaking definition); *id.* at 126 (Appendix to Attorney General's Statement) (basic scheme of APA is to classify *all* administrative proceedings into two categories, rulemaking and adjudication).[13] *See generally* Schwartz, *Administrative Law* 143 (1976) (APA based on fundamental dichotomy between rulemaking and adjudication).[14]

Given the dichotomous structure of the APA, the Administration's new policy must be a rule or an order. The district court applied the definition of a rule set forth in § 551(4) and found that the policy change fell squarely within that definition. We agree an announcement that INS will universally enforce a detention policy while limiting parole is "an agency statement of general ... applicability and future effect designed to implement, interpret, or prescribe law or policy ...," in other words, a rule. The government attacks this approach as simplistic, yet it is exactly what the Administrative Procedure Act requires.

A similar issue was before us in *American Trucking Association, Inc. v. United States*, 688 F.2d 1337 (11th Cir.1982), where we were asked to determine whether an action taken by the Interstate Commerce Commission (ICC) revoking all "special permission authorities"[15] was a "rule" within the meaning of APA § 551(4). Although the decision to grant or withhold a special permission authority in an individual case was discretionary in the ICC and required no recourse to notice and comment procedures, in *American Trucking* the ICC determined it would cancel *all* existing permission au-

13. "The courts have given deference to the interpretations of the Attorney General's Manual 'because of the role played by the Department of Justice in drafting the legislation.' *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546, 98 S.Ct. 1197, 1213, 55 L.Ed.2d 460 (1978)." *Guardian Federal*, 589 F.2d at 664 n. 21.

14. Recent cases acknowledge a third form of administrative activity—the investigative function—that is not covered by the APA. *See, e.g., Guardian Federal*, 589 F.2d at 663, and cases cited therein, *id.* at n. 12. Even assuming the validity of the distinction, however, it is limited to administrative functions non-regulatory in manner and would not encompass the issues in this case, which are squarely within the regulatory realm of the INS.

15. A "special permission authority" is a finding of cause that permits the ICC to reduce a 30-day waiting period before a proposed rate change goes into effect. *American Trucking Association, Inc.*, 688 F.2d 1337 at 1347.

thorities and implied it would not issue any in the future. In a carefully reasoned opinion by the Chief Judge we held:

> While a decision in a particular case or cases to revoke a special permission authority would not be rulemaking, *the decision to reverse a longstanding and uniform practice by revoking all outstanding authorities* of a particular type and implicitly indicating that no such authorities will be issued in the future *is clearly a rule.*

688 F.2d at 1348 (emphasis supplied). This is the situation before us here. Although a decision to grant or deny parole in an individual case would not be rulemaking, the far-reaching policy announced by the government in this case, reversing the longstanding old policy and instituting the new policy "is clearly a rule." *Id.*

[14] Despite the above authority the government argues that because the statute explicitly mandates detention, *see* 8 U.S.C. § 1225(b) ("shall be detained") and explicitly leaves parole decisions within the discretion of the Attorney General, *id.* § 1182(d)(5)(A) ("Attorney General may, . . . in his discretion parole"), no rule is required to enforce the statute. In other words, the government contends it is doing nothing more than implementing the express language of the statute. The government's argument, however, misses the mark; the fact that an agency need not employ rulemaking in order to exercise its discretion on a case-by-case basis does not mean it cannot or has not resorted to a rule of general applicability which limits its discretionary function. In the event there is resort to a rule, rulemaking is required. 5 U.S.C. § 553.

In this regard *Fook Hong Mak v. Immigration and Naturalization Service*, 435 F.2d 728 (2d Cir.1970), is instructive. In *Fook Hong Mak* appellant originally sought discretionary relief from the INS to prevent his deportation. His primary interest was an adjustment of status so he could remain lawfully in the country, but under regulations adopted by the Attorney General Fook Hong Mak was precluded from consideration for such relief.[8] The INS therefore denied him adjustment of status, and granted a request for voluntary departure. Fook Hong Mak challenged this action, stating that "whether or not the Board would have been justified in denying his application for adjustment of status on the merits, the Attorney General's self-imposed restriction [in the regulations] on the consideration of it is unlawful." 435 F.2d at 730. Denying Fook Hong Mak's claims, Judge Friendly wrote, "[w]e are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis. . . ." *Id.*

[15] *Fook Hong Mak* stands for the proposition that an administrator vested with discretionary authority to act on a case-by-case basis may exercise that discretion by promulgating rules of general applicability. If the administrator does announce a general rule, however, rulemaking procedures must be followed. 5 U.S.C. § 553(b) & (c). *See also Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 744–45 (3d Cir.1969) (crucial fact not whether burden could be imposed in *ad hoc* order, but whether agency elected to proceed with general rule). Here the court below found the new policy to be a rule and we concur in that determination. Whether the statute allowed INS to exercise its discretion on a case-by-case basis without rulemaking is irrelevant; once a rule of general applicability was employed rulemaking was required. *Cf. Fook Hong Mak*, 435 F.2d at 730. Unless a specific exception to the rulemaking requirement of § 553(c) applies, therefore, it was error for the government to proceed to detain immigrants on the basis of the

[8] The regulations applicable in *Fook Hong Mak* provided that aliens who obtained admission without a visa as being in immediate and continuous transit through the United States should not be eligible to apply for adjustment of status. 435 F.2d at 729. Fook Hong Mak fell into that class of ineligibles.

new policy without adhering to rulemaking procedures.

B. *Rulemaking Exceptions*

Complementing the broad definition of "rule" in § 551(4) the APA provides a number of exceptions that permit promulgation of certain rules without recourse to the rulemaking procedures. *See* 5 U.S.C. §§ 553(a); 553(b)(A) & (B). The government urges that three of these exceptions apply in this case: the foreign affairs function exception, 5 U.S.C. § 553(a)(1), the interpretative rule exception, *id.* (b)(A) and the exception for general statements of policy, *id.*

1. *The "Foreign Affairs" Exception*

[16] APA § 553(a)(1) exempts from notice and comment rulemaking those rules involving "a military or foreign affairs function of the United States." The legislative history of § 553(a)(1) indicates the exception should be construed narrowly to include only those " 'affairs' which so affect relations with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences." S.Rep. No. 752, 79th Cong., 1st Sess. 13 (1945). The district court found nothing in the record to support a finding that promulgation of the new parole policy would have resulted in "undesirable international consequences." *Louis III* at 996.[17] The court opinion stated: "At best, the connection between the detention policy and this country's conduct of foreign affairs is tenuous and certainly not substantial enough" to fit within the exception of 5 U.S.C. § 553(a)(1). *Id.* We agree.

Despite a dearth of case law on the exception embodied in § 553(a)(1), what precedent there is supports the district judge's conclusion that application of the exception in this case would distend that exception beyond the scope intended by Congress. *See Yassini v. Crosland*, 618 F.2d 1356 (9th Cir.1980) (though immigration matters typically implicate foreign affairs court applied exception in light of extraordinary circumstances). The case *sub judice* readily is distinguishable from cases relied upon by the government. For example, in *Yassini* the court found an INS directive rescinding deferred departure for Iranian students to be within the foreign affairs exception on the basis that the Commissioner of the INS was "implementing the President's foreign policy." 618 F.2d at 1361. The court there found the challenged directive was part of the Administration's response to the November 4, 1979, takeover of the United States Embassy in Tehran. On November 10, 1979, in reaction to the takeover, the President directed the Attorney General to identify Iranian nationals not in compliance with the terms of their entry visas, and to take steps to deport those who violated immigration laws. *Id.* at 1359.

The directive at issue in *Yassini* was related intimately to the foreign policy of this country. At the time the directive issued Iranian militants held American nationals hostage at our embassy in Tehran, and the President was struggling to obtain their release. Actions taken by the Commissioner of the INS were in direct response to those release attempts. In its opinion the *Yassini* court noted "[a] rule of law that would inhibit flexibility of the political branches should be adopted with only great caution and judicial review of decisions made by the congress or the President in this area is limited." 618 F.2d at 1360.

This case does not involve sensitive foreign policy issues of a magnitude similar to those in *Yassini*. *See also Nademi v. INS*, 679 F.2d 811, 814 (10th Cir.) (visa regulations for Iranian nationals during embassy takeover; specific delegation from President to Attorney General to aid resolution

17. The court below not only found nothing in the record to support a finding of undesirable consequences stemming from publication of the new policy, it believed "[t]o the contrary, publication may have enhanced the deterrent effect of the new policy and deterrence is one of the goals the Government sought to attain by initiating the detention policy." *Louis III* at 996.

of crisis), cert. denied, —— U.S. ——, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982); *Malek-Marzban v. INS*, 658 F.2d 113, 116 (4th Cir.1981) (voluntary departure regulations for Iranian nationals in face of embassy takeover). The government at trial offered no evidence of undesirable international consequences that would result if rulemaking were employed. It argues only that the new policy touched on national sovereignty because, in the course of developing the policy, the President requested and received international cooperation. Certainly many issues with which the President deals involve national sovereignty; not all would have undesirable international consequences if rulemaking procedures were followed. Not every request for international cooperation seriously may be called "foreign policy." In light of Congress' intention that this exception receive limited application the district court correctly found the exception inapplicable.

2. *Interpretative Rules*

APA § 553(b)(A) exempts from the requirements of notice and comment rulemaking "interpretative rules," and "general statements of policy." The district court correctly observed that although the categories differ the APA provides little guidance as to those differences. The government urges that the policy change at issue here is an "interpretative rule or general statement of policy," yet fails to distinguish between them and offers legal argument only for the conclusion that the policy change is a general statement of policy.

[17] The *Attorney General's Manual* defines "interpretative rule" as an "agency's construction of the statutes and rules which it administers." *Id.* at 30 n. 3. Courts further define the term to mean "statements as to what the administrative officer thinks the statute or regulation means." *Chamber of Commerce v. Occupational Safety and Health Administration*, 636 F.2d 464, 469 (D.C.Cir.1980); *Citizens to Save Spencer County v. Environmental Protection Agency*, 600 F.2d 844, 875 (D.C. Cir.1979). Interpretative rules are a "clarification or explanation of existing laws or regulations rather than a substantive modification [of existing regulations] or adoption of new regulations," *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir.1979) (citation omitted). Perhaps the most significant factor is that interpretative rules are non-legislative, in that they are promulgated without the exercise of delegated authority to create new law. *See American Trucking Association*, 688 F.2d 1337 at 1341 (11th Cir.1982).

[18] The announced new policy does not fit comfortably within any of the aforementioned qualifications. It goes further than "explanation" or "clarification" and states a new future course of action. The district court apparently agreed; it set forth the law concerning interpretative rules but drew no conclusion, proceeding instead to examine the rule as a general statement of policy. Because the government offers no support for application of the interpretative rule exception, analyzing the new policy only as a general statement of policy, and because we believe analysis as an interpretative rule inappropriate here, we also proceed to the general statement of policy exception.

3. *General Statement of Policy Exception*

The government argues finally that the new policy falls within the exception in APA § 553(b)(A) for "general statements of policy." The district court found the exception inapplicable. Although the law in this area is less than clear, we believe the district court applied the incorrect test, yet reached a correct conclusion.

[19] The court below rested its determination that the new policy was not a general statement of policy on two grounds. First, the district court found the immediate impact of the new policy significant.

> Clearly, the new detention policy is not a general statement of policy that INS hopes to implement in the future. It is being implemented right now! Nor does it set a goal that future proceedings *may* achieve, for the change has been present-

ed as a *fait accompli*. Immediately upon its effective date the former practice of freely paroling Haitians into the community ceased and a new policy paroling only humanitarian cases began. Thus, the new criteria for release is not exempt from APA requirements as a "general statement of policy."

Louis III at 996–97 (emphasis in original). Although some cases offer support for "immediacy" as a factor, *see Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C.Cir.1974) (general statement of policy is an announcement to public of policy agency hopes to implement in future rulemakings); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir.1979),[18] we do not believe this is the determinative consideration. Nothing in the statutory phrase "general statement of policy" requires or even suggests that to fall within the exception the policy must take effect in the future. As Professor Davis recognizes, it is a general statement of policy to announce: "[o]ur general policy always has been and still is . . . ." *Davis* Supp. § 7.5, p. 169.[19]

Second, the district court relied upon a determination that the policy at hand had a "substantial impact" upon the incarcerated Haitians. The court applied its "substantial impact" test largely in reliance upon the decision in *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir.1979). *Louis III* at 997. This reliance was misplaced. A careful reading of *Brown Express* indicates that opinion did not apply a substantial impact test to the general statement of policy exception. 607 F.2d at 701. The "substantial impact" test was used by the *Brown Express* court to determine whether a rule was "substantive" or "procedural," in order to determine whether the rule there at issue fell within a separate and distinct rulemaking exception. *Id.* at 702. *See* 5 U.S.C. § 553(b)(A) (rules of agency organization, procedure, or practice). *See also American Trucking* at 1351 (this court has never applied substantial impact test to interpretative rules though we did apply it to procedural rules in *Brown Express*). *But see American Trucking, supra* at 1351 (courts usually do not distinguish between § 553(b)(A) exceptions in applying substantial impact test). Further, our recent opinions call into question application of the substantial impact test to any rulemaking exception. *See id.* at 1352 & n. 20.[20]

18. Because *Brown Express* was decided by the Former Fifth Circuit we are bound by its holdings. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

Our decision is not inconsistent with the *Brown Express* opinion. We do note the holding of *Brown Express* is not that immediacy deprives a rule of general statement of policy status, but that "[a]n announcement stating a change in the method by which an agency will grant substantive rights is not a 'general statement of policy' ". 607 F.2d at 701. That does not tell us what a general statement of policy *is*, only what it *is not*. We note further the rationale of *Brown Express* has come under attack recently by both court and commentator. *See Davis* Supp. § 7.4, at 166. (*Brown Express* is a gold mine of ideas "that mostly are contrary to established law"). At least one other panel of this circuit has described difficulties with the underlying reasoning of that opinion. *See American Trucking, supra*, 688 F.2d 1337 at 1351.

19. As to the immediacy requirement Professor Davis offers the following:

> . . . a statement may be one of general policy, even though it is limited to past and present policy and says nothing about future or prospective policy.
>
> The trouble stems from the Attorney General's Manual (1947), which in a footnote at page 30 said: '*General statements of policy* —statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.' That is all the Manual said; it did not say that a statement about policy which is general is not a general statement of policy if it is not prospective.

Davis Supp. § 7:5 at 170.

20. In *American Trucking* Chief Judge Godbold stated "[t]here are significant theoretical difficulties in applying the substantial impact test, however, and therefore we avoid endorsement of it at this time." In a note to the first clause of that sentence he explains those theoretical difficulties, 688 F.2d at 1352 n. 20. We quote that footnote in its entirety:

> The substantial impact test is typically reasoned under two different theories: as a gloss on the statutory exception for "interpretative" rules, the *statute* requires notice and comment even though a rule is "interpretative" if it has substantial impact; as a judi-

[20] We here conclude that the substantial impact test is insufficient to determine whether a rule is a general statement of policy. Policy statements often have a substantial impact, the more general, the more substantial. As Professor Davis notes, commenting upon the Second Circuit decision in *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975), discussed *infra*:

> Even if fairness to the aliens in the *Noel* case may have called for § 553 procedure before the INS changed the practice of the New York district director to the disadvantage of the aliens, still the element of seeming unfairness may stem much more from Congress than from the court, for § 553 does exempt "general statements of policy" from the procedural requirements and thereby authorizes the most crucial policy determinations to be made without the procedure of notice and written comments.

In all fairness to the district court, analyzing a rule within the general statement of policy exception is akin to wandering lost in the Serbonian Bog. *See Guardian Federal*, 589 F.2d at 668 (matters concerning application of exception to case not wholly free from doubt); *Noel v. Chapman*, 508 F.2d at 1030 (general statement of policy exception enshrouded in considerable smog); *Davis*, § 7.5 p. 32 (area confusing; perhaps only Congress can correct the confusion). The term itself—"general statement of policy"—offers little guidance. The new policy at issue was a "statement," was by its terms "general," and it was a matter of "policy," but if this were all the analysis required many more rules would qualify under the exception and fewer courts would find the area a morass. The legislative history offers little guidance. *See Davis* § 7.6, p. 32. The Supreme Court has yet to offer a definitive test. Courts that have addressed the issue present any number of ideas as to what constitutes a general statement of policy; the ideas often are intuitive, with little foundation in the statute or legislative history.

[21] Given some of the confusion in this area we approach our analysis with basic principles concerning rulemaking. In *Guardian Federal* the District of Columbia

> cially-created procedural requirement, notice and comment procedures are imposed *in addition* to the requirement of the APA if demanded by fundamental fairness. *See Davis Treatise, supra*, at § 7:18. The first theory has been criticized as unsound. Id., 1982 Supplement at 127 (criticizing *Brown Express, supra*); *Administrative Law of the Seventies, supra* at 193. The second theory is put in doubt by the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978), where it stated that courts may add on to the APA procedural requirements only in "extremely rare" or "extremely compelling" cases. *See Energy Resources Group, Inc. v. Department of Energy*, 580 F.2d 1062, 1066–66 (Emer.Ct.App. 1978) (holding that *Vermont Yankee* precludes substantial impact test); *Davis Treatise, supra*, at §§ 6:35–36, 7:19 and 1982 Supplement at 127–47 (attempting to write off the *Vermont Yankee* "dictum").
>
> In addition to the two principal theories it is also possible that the substantial impact test is not distinct from the initial determination of whether a rule is "interpretative" but is subsumed within this determination as a factor in determining whether a rule is "legislative." *See* discussion in text preceding note 11 *supra*. If this is the only role of the substantial impact test it has a much decreased significance, for as explained above the substantial impact of a rule is only one, weakly relevant consideration in the legislative rule determination. *Id.*
>
> The enunciated criticisms apply equally here, perhaps more so because the third theoretical underpinning is entirely unjustified.
>
> Despite acknowledgment of difficulties with the test, the *American Trucking* opinion assumes "arguendo that this approach is applicable" and that the rule in question does not have substantial impact. *Id.* We could do the same, *see Noel v. Chapman*, 508 F.2d 1023, 1030 (2nd Cir.1975) ("so-called" substantial impact test not determinative of general statement of policy at issue because policy announcement only a guide for, but does not control discretion), but decline to extend precedent generally recognized to rest on a questionable foundation. Nor is it necessary for us to do so, because no precedent in this circuit applies the "substantial impact" test to general statements of policy. Instead, we set out in the text of this opinion the factor we believe the statute does mandate considering in identifying a general statement of policy.

Circuit set forth succinctly the benefits of notice and comment rulemaking:

> This public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions. Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance.

589 F.2d at 662. The exceptions to the rulemaking requirement, on the other hand, come into play when the benefits of public rulemaking procedures are outweighed by other considerations, or when no benefits accrue to the use of the rulemaking procedures. The District of Columbia Circuit noted in *Guardian Federal* that the exceptions "accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition, and reduction in expense. *Id.* at 662. Therefore, despite the preferential position of rulemaking in the APA, *see American Bus Association v. United States*, 627 F.2d 525, 528 & n. 2 (D.C.Cir.1980) (salutary effect of rulemaking procedures cannot be gainsaid; exceptions should be noted reluctantly), there are instances when Congress intended the balance to shift the other way.

[22, 23] In determining whether to apply a general statement of policy exception to a given rule one overriding factor frequently relied upon by courts addressing the issue strikes the balance enunciated above. That factor addresses the extent to which the challenged policy leaves the agency, or its implementing official, free to exercise discretion to follow, or not follow, the general policy in an individual case. Often referred to as examining whether the policy establishes "a binding norm," [21] the issue is whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion.[22] The signifi-

21. *Guardian Federal, supra*, 589 F.2d at 666. At issue in *Guardian Federal* were regulations specifying the criterion that audits and auditors were required to fulfill in order to produce an audit satisfactory to the FSLIC. The *Guardian Federal* court held that the regulations at issue were within the general statement of policy exception, relying upon two familiar factors.

> First, in enunciating the critical test of whether a rule was a general statement of policy the court stated: A general statement of policy does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed." 589 F.2d at 666 (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (1974)). Second, the District of Columbia Circuit found that the regulations at issue effectively preserved the Administrator's discretion. Although the regulation set forth criterion to be followed, the "Chief Examiner has discretion to accept a non-conforming audit report, or for that matter to prescribe additional requirements in a particular case," *id.* The court then stated the second test: "[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law." The test set forth in *Guardian Federal* is in large part the one we adopt. We have attempted, however, to develop the underlying rationale.

22. *See Pinkus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C.Cir.1974) (parole criteria so "narrow [decisionmaker's] field of vision that in effect they limit influence of any other factors); *Guardian Federal, supra*, 589 F.2d at 666 (general statement of policy must leave administrator free "to exercise his informed discretion in situations that arise"); *Parco v. Morris*, 426 F.Supp. 976, 985 (E.D.Pa. 1977) (not a general statement of policy when rule purports to grant discretion but has result of *all* cases being resolved in one manner). This case is unique to the extent that the statute being "filled in" by the policy statement has as a standard the "discretion" of the Attorney General. *See* 8 U.S.C. § 1182(d)(5)(A) (Attorney General may, in his discretion, parole aliens). Other cases express this concept of a "binding norm" differently, for example describing the alleged policy as "imposing rights and obligations" on the party before the agency. *Texaco v. FPC*, 412 F.2d 740, 744 (3d Cir.1969) (waiver provision no substitute for informed discretion; rule at issue finally determines rights and obligations). The ultimate concern, however, is that the agency, despite its announced policy, be free to consider on their facts the cases that arise, without constraint of the "policy."

cance of this factor is that it reveals whether, if objections to the rule cannot be voiced through notice and comment rulemaking at the time of promulgation, there will be a subsequent opportunity to object to a specific application of the rule. If an agency, or its official, is bound to apply an airtight rule in a given case it is important to allow specific objections prior to promulgation, lest these objections be forfeited. If, however, a sufficiently general rule guides the agency's decision, but application of the rule to a unique set of facts is subject to challenge, prior opportunity to object is less important and the balance may mitigate against notice and comment rulemaking.[23]

Here, measuring the new policy by this standard, we find the balance is struck in favor of notice and comment rulemaking. We so hold because of the peculiar facts of this case. This is not a case where a policy was developed and announced at the highest level of government, and implemented in accord with that announcement. Those who formulated the policy failed to convey the policy to those responsible for implementing it. Left without guidance as to how to implement an undefined policy, the immigration inspectors enforced the detention policy as if it was intended to apply solely, and uniformly, to Haitians.

[24] We are faced with the choice of analyzing either a policy ranking immigration officials insist they adopted, or one their subordinates believed they were responsible for implementing.[24] The latter presents the only sensible approach. Though the genesis of discriminatory enforcement may have been only a failure to clarify a general policy, the reality is that "the absence of guidelines for detention and parole" accounted for "inconsistencies between what the Government witnesses said the policy was and the policy their subordinates were carrying out." *Louis III* at 981 n. 24. Those subordinates implemented a policy which led to widespread incarceration of the Haitians, humanitarian cases or otherwise.[25] A broad rule of detention with undefined exceptions is susceptible to rigid enforcement with no opportunity to avoid the rule's harsh results.[26] Such a rule can-

23. An example emphasizes this point. Consider the case of an fifty-year old undocumented male immigrant with a severe heart condition, examined in light of two possible formulations of a parole policy. Under the first hypothetical formulation INS determines it will detain all undocumented immigrants unless they are (1) under six years of age, (2) over 60 years of age, or (3) pregnant. Under the second formulation INS determines it will detain all undocumented immigrants unless there are "significant humanitarian reasons." The first formulation does not allow for discretionary relief from the general rule. Under the second formulation the standard—"significant humanitarian reasons"—is so broad that the agency official is free to grant relief.

24. We presume the policy as applied by immigration inspectors was the policy they believed their superiors intended them to apply. We have no basis for believing the immigration inspectors responsible for implementing the new policy did so in a manner deliberately contrary to what their superiors required. What happened here strikes us as analogous to the children's game "telephone," where a child at the start of the line whispers a phrase in the ear of the child beside him, and so on down the line. Inevitably, the phrase uttered by the last child in line bears little resemblance to the original phrase. Here the Administration announced a policy in the most general of terms; without explicit instruction, however, that policy was implemented in a specific discriminatory manner. There is no evidence that the subordinates were instructed they were applying an unintended policy.

25. The record indicates not all Haitians were denied parole. It is impossible to determine on the record, however, the basis for granting parole in some cases and denying it in others. Certainly it was not "humanitarian cases," *see supra* III, C, discussing failings of the evidence in this regard. To the extent grants of parole were arbitrary and unprincipled, the only identifiable "norm" was detention.

26. The Administration announced a broad policy of detention. The announcement, made in the context of Haitian immigration, failed to set out guidelines for discretionary parole. It is unsurprising that the message received by immigration officials responsible for implementing the policy was to detain Haitians. *See* I, D *supra* for a full explication of the policy announcement.

We emphasize we are not analyzing the effect of a policy, i.e. its impact, substantial or otherwise. The procedures of the Administrative Procedure Act are without value if it cannot be determined at the time of announce-

not be a general statement of policy; in truth it creates a binding norm.[27] Consequently, the general statement of policy exception is not applicable here. Because we conclude the new policy was not within any of the notice and comment rulemaking exceptions, we affirm the judgment of the district court as to Count II.

III. Equal Protection of the Law

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The Declaration of Independence (1776).

Plaintiffs asserted below that the government violated their fifth amendment rights by enforcing its new policy in a discriminatory manner. The district court found the Haitians bore the brunt of the new policy to a degree greater than any other nationality at that time, *Louis III* at 1000, but concluded that "Defendants intended to be fair and that if another class of aliens arrived in this country in a situation similar to that of the Plaintiffs they would be treated in a similar fashion." *Id.* at 1001. Holding plaintiffs failed to meet their burden of proof on the discrimination issue, the district court ruled in favor of the government.

A. *General Principles*

1. *Alien's Rights*

[25] The district court initially addressed the question whether excludable aliens could raise an equal protection claim. Comparing pre-exclusion parole to a criminal defendant's right to pre-trial bond, the district court determined that class members could seek protection under the fifth amendment from discriminatory exercises of the parole power. We agree.

As we discussed *supra*, the excludable alien knocking at our door has few constitutional rights when seeking admission to this country. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n. 5, 73 S.Ct. 472, 477 n. 5, 97 L.Ed. 576 (1953) (Bill of Rights futile authority for alien seeking admission for the first time). Congress, exercising this nation's inherent rights of sovereignty, has plenary authority over the who and how of immigration—"[w]hatever the procedure authorized by Congress is, it is due process

ment, whether or not a rule is within the general statement of policy exception. The inherent nature of the broad detention policy announced by the government, with reference to Haitian immigration, was too readily susceptible to rigid discriminatory enforcement. This case is factually unique because the breadth of the new policy, a policy without guidelines for enforcement, accounted for its establishing a "binding norm."

27. The government directs our attention to *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975). In *Noel* an INS statement limiting the discretion of the district director to grant the privilege of voluntary departure to deportable aliens was at issue. The New York district director of INS maintained a "more liberal" policy than the rest of the United States with respect to the suspension of deportation for illegal aliens married to permanent aliens. *Id.* at 1025. INS informed its district directors that, as of July 31, 1972, deportation dates should not be suspended except where compelling circumstances warranted the suspension. *Id.* The Second Circuit held that INS' announcement, the purpose of which was to bring New York into line with the rest of the country, fell within the general statement of policy exception to the rulemaking requirements of the APA. *Id.* at 1030–31.

The Second Circuit enunciated several factors that supported its determination. First, it stated: "We cannot conclude that the instructions at issue here change the existing right of the appellants to have their applications for extensions of time to depart authorized in the sole discretion of the District Director." 508 F.2d at 1030. Second, the *Noel* court relies upon a statement by Judge Friendly that " '[o]ne of the values of the policy statement [is] *the education of agency members in the agency's work,*' " *id.* at 1030 (emphasis in original). The *Noel* court distinguished between statements directed at staff to explain how to conduct discretionary functions, and statements directed at the public to impose obligations upon them.

This case is distinguishable from *Noel*. Although those who originally announced the new policy may have intended it not to limit discretion, and to serve only to educate agency officials, we find those responsible for establishing the policy failed to convey its general nature.

as far as the alien denied entry is concerned." *Mezei, supra*, 97 L.Ed. at 963, 345 U.S. at 212, 73 S.Ct. at 629.[28] Just this term the Supreme Court reaffirmed this position, stating "[t]his Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights *regarding his application*, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, — U.S. — at —, 103 S.Ct. 321 at 329, 74 L.Ed.2d 21 (1982) (emphasis supplied).

At issue here, however, is not a right to admission and attendant procedures, but a right to be considered for parole in a nondiscriminatory fashion. In this regard Judge Spellman noted "the [Supreme] Court has never held, . . . 'the Constitutional guarantees of the Fifth Amendment do not extend to unadmitted aliens.'" *Louis III* at 998. Indeed, as early as 1885 the Supreme Court, discussing the scope of the Fourteenth Amendment, stated:

> *The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.* It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' *These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality;* and the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220, 226 (1886) (emphasis supplied).

The problem here is the fiction that excludable aliens are not within the "territorial limits" of the United States. Though that fiction serves its purpose to limit the procedural rights of an excludable alien "regarding his application" for admission, *Landon v. Plascencia, supra*, it strains credulity to maintain that an alien within our territorial limits may claim none of the rights accorded our citizens. And, indeed, in situations where excludable aliens within our borders have claimed deprivations of fundamental rights, the courts have been quick to respond. In *Rodriquez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir.1981), the Tenth Circuit held "punishment" of excludable aliens was improper without the "substantive and procedural due process guarantees of the Fifth Amendment." "Surely Congress could not order the killing of Rodriquez-Fernandez and others in his status on the ground that Cuba would not take them back and this country does not want them." *Id.* at 1387. And, in *United States v. Henry*, 604 F.2d 908 (5th Cir.1979), the court held that an excludable alien is entitled to fifth amendment rights once criminal proceedings against him have commenced. *Id.* at 914. *See also Plyer v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982) (whatever status is under immigration laws, undocumented alien is surely "person" in ordinary sense of word under fifth and fourteenth amendments) (deportable alien). *See generally* Note, *The Constitutional Rights of Excluded Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees*, 70 Geo.L.J. 1303 (1982).

[26] Although the class members ultimately seek admission to this country, the present action does not "relate to admission and does not challenge Congress' power in that regard." *Louis III* at 34. In fact, though detention is the underlying predicate of this action, class members do not even question the right of Congress or the Executive to detain them. Rather, they challenge the discretionary exercise of the Executive's parole power when that power is exercised on the basis of race or national origin. Accordingly this action falls within

28. Relying on language in cases such as *Mezei*, the government argued below that excludable aliens have no fifth amendment rights to assert. The district court rejected this, as we note in our opinion, and the government does not specifically challenge that determination. In light of the import of the issue, however, we address the merits and affirm the determination of the district court.

the rubric of such cases as *Yick Wo*, *Plyer*, *Henry* and *Rodriquez-Fernandez*, and differs from challenges to immigration procedures rejected in *Mezei* and *Knauff*.

Even were we unprepared to accord these aliens full equal protection rights we would be compelled to consider this discrimination claim. Our standard of review under *Mezei* and *Knauff* is to assure aliens receive that process Congress determined was due; on the record before us we can but determine that Congress intended the statutes under which the INS acted to be applied in a non-discriminatory fashion. This the district court explained:

> It is important to note that the actions challenged herein are *not* Congressional. Plaintiffs allege the Defendants are applying a neutral statute in a discriminatory fashion. This distinction, between legislation and enforcement, is critical. *Congress* can legitimately make distinctions among and against aliens that would be unacceptable if applied to citizens, *Mathews v. Diaz*, 426 U.S. 67, 80 [96 S.Ct. 1883, 1891, 48 L.Ed.2d 478] (1976), but "[i]n the *enforcement of these policies*, the Executive Branch of the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 530 [74 S.Ct. 737, 742, 98 L.Ed. 911] (1954) (Frankfurter, J.), cited in, *Faillo v. Bell*, 430 U.S. 787, 792 n. 4 [97 S.Ct. 1473, 1478 n. 4, 52 L.Ed.2d 50] (1977). (Emphasis added). "A statute, otherwise neutral in its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 [6 S.Ct. 1064, 1070, 30 L.Ed. 220] (1886)." *Washington v. Davis*, 426 U.S. 229, 241 [96 S.Ct. 2040, 2048, 48 L.Ed.2d 597] (1976).

Louis III at 998–99.

2. *Proof of Discrimination: the legal standard*

[27] In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) [hereinafter "*Arlington Heights*"] the Supreme Court held that plaintiffs challenging an action as discriminatory must go further than identifying a disparate impact and prove the challenged action was the product of discriminatory intent. 429 U.S. at 265, 97 S.Ct. at 563, 50 L.Ed.2d at 464; 426 U.S. at 240–42, 96 S.Ct. at 2047–49, 48 L.Ed.2d at 607–09. Recognizing that legislative and administrative actions are rarely motivated by one purpose only, the Court held plaintiffs must establish that the challenged decision was at least motivated in part by a discriminatory purpose. 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465. *See also Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Plaintiffs need not prove a discriminatory purpose was the primary, or dominant purpose, *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465, but must show that the action taken was, at least in part, "because of," and not merely "in spite of" its adverse effects upon an identifiable group, *Feeney, supra*, 442 U.S. at 279 & n. 24, 99 S.Ct. at 2296 & n. 24.

[28, 29] The very nature of legislative and administrative action makes it difficult to ascertain the "intent" of the acting body. For that reason, in *Arlington Heights* the Supreme Court provided some examples of "circumstantial and direct evidence" that courts might properly consider in judging whether invidious discrimination permeated official action. First, there is evidence of "impact," i.e. whether the challenged activity "bears more heavily on one race than another," *id.* 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465, *citing Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597, 608.[29] In cases where proof

29. A claim of discrimination based on nationality does not differ from that based on race. *See, e.g., Cestaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1976) (Mexican-Americans); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese). Plaintiffs consistently have addressed this case as one premised both on nationality (Haitian) and race (black). The bulk of the evidence,

of impact alone is insufficient, where a stark pattern of discrimination is not evident, the courts should consider circumstantial evidence, which includes the following factors: (1) historical background of the decision, (2) the specific sequence of events leading up to the challenged decision, (3) departures from the normal procedural sequence, as well as substantive departures, and (4) legislative or administrative history. 429 U.S. at 265–66, 97 S.Ct. at 563, 50 L.Ed.2d at 464–66. And, because these factors are not exhaustive, *id.* 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 466, the list has been supplemented: (5) foreseeability of discriminatory impact, *Columbus Board of Education v. Penick*, 443 U.S. 449, 464–65, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979), (6) knowledge of discriminatory impact, *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1048 (6th Cir.1977), *cert. denied*, 434 U.S. 997, 98 S.Ct. 635, 54 L.Ed.2d 491 (1979), and (7) the availability of less discriminatory alternatives, *United States v. Board of School Commissioners of Indianapolis*, 573 F.2d 400, 413 (7th Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978).

[30–32] Once plaintiffs come forward with evidence sufficient to support a *prima facie* claim the burden shifts to the defendant, the government in this case, "to dispel the inference of intentional discrimination." *Castaneda v. Partida*, 430 U.S. 482, 497, 97 S.Ct. 1272, 1282, 51 L.Ed.2d 498, 512 (1977); *Castaneda v. Pickard*, 648 F.2d 989, 1003–04 (5th Cir.1981). Although the quantum of evidence required from the defendant is unclear from the Supreme Court's decisions it is established that mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut the prima facie case.[39] *Castaneda*, 430 U.S. at 499 n. 19, 97 S.Ct. at 1282 n. 19, 51 L.Ed.2d at 513 n. 19 (cases cited). A defendant must introduce evidence to support its explanations. *Castaneda*, 430 U.S. at 499 n. 19, 97 S.Ct. at 1282 n. 19, 51 L.Ed.2d at 513 n. 19. *Cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 9, 101 S.Ct. 1089, 1094 n. 9, 67 L.Ed.2d 207, 216 n. 9 (1981).

[33] Finally, should the government succeed in rebutting plaintiffs' prima facie case, the trial judge must evaluate the weight of the evidence. It is inevitably the task of the trier of fact to decide whether plaintiffs have succeeded, in the face of the defendant's rebuttal, in proving, by a preponderance of the evidence, that defendant's actions were taken in part because of a discriminatory intent or purpose. *Cf. Burdine*, 450 U.S. at 252–53, 101 S.Ct. at 1093.

8. *The District Court's Findings*

We cannot determine precisely what the district court concluded as to the individual aspects of prima facie case, rebuttal, and ultimate proof. From the absence of any discussion of rebuttal it might appear the court below found insufficient proof to establish a prima facie case. We conclude differently, however, for the district court considered government arguments that are properly considered as rebuttal, if at all.

however, was addressed to the nationality claim.

39. In this portion of our opinion we rely upon a number of Title VII cases. Although the standard of proof in Title VII cases differs from that in constitutional equal protection cases, the framework for proving a case, *i.e.* prima facie case, rebuttal, ultimate proof, is the same. *See, e.g., Castaneda v. Partida*, 430 U.S. at 495–96, 496, 97 S.Ct. at 1280–81, 51 L.Ed.2d at 508, 511 (establishing prima facie case requiring rebuttal in jury discrimination case). Because of the similar framework, and because there are few equal protection cases relying on statistics, when appropriate we draw upon Title VII cases. *E.g., Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 424 (5th Cir.1980) (rebuttal includes existence of "legitimate nondiscriminatory reason" for defendant's action, or evidence of "total unacceptability of plaintiff's statistical evidence"), *vacated and remanded*, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981), *modified in part, rev'd in part*, 657 F.2d 750 (5th Cir. 1981), *cert. denied*, — U.S. —, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982).

[34] The government's case rested on two independent general arguments. The first attacked the validity of plaintiff's statistical evidence, and the second proffered explanations to dispel the appearance of disparate impact. Both government arguments are considered properly as rebuttal. *See Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 424 (5th Cir.1980) (rebuttal includes existence of "legitimate nondiscriminatory reason for defendant's action, or evidence of "total unacceptability of plaintiff's statistical evidence"), *vacated and remanded*, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981), *modified in part, rev'd in part*, 657 F.2d 750 (5th Cir.1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982).

[35, 36] The prima facie case, however, is based solely on evidence presented by the plaintiff, and is evaluated to determine whether plaintiff could survive a motion to dismiss at the close of its case. *See Burdine*, 450 U.S. at 253–55, 101 S.Ct. at 1093–95, 67 L.Ed.2d at 215–16 (Title VII); *cf. Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir.1981) (prima facie showing of personal jurisdiction established on basis of plaintiff's affidavits and materials); *White v. Abrams*, 495 F.2d 724, 729 (9th Cir.1974) (prima facie case is sufficient evidence for plaintiff to survive motion to dismiss or motion for directed verdict; plaintiff must present evidence sufficient to require defendant to present its case); *Warner v. KeWanee Machinery & Conveyor Co.*, 411 F.2d 1060, 1063 (6th Cir.1969) (prima facie case evaluated to see if plaintiff's evidence raises issue for jury). We are convinced that if the prima facie case were segregated from rebuttal and ultimate proof the district judge would conclude, as we do, that this preliminary burden was met. The statistical evidence presented by plaintiffs, *see infra*, disclosed a stark pattern of discrimination. We are not overly concerned at this juncture, however, with the district court's failure to separate preliminary and final burdens. It may have been impossible to categorize the evidence, as was the case in *Equal Employment Opportunity Commission v. Datapoint Corp.*, 570 F.2d 1264, 1268 (5th Cir.1978), where we noted:

> However, in this case the failure of the trial court to expressly make such determination is not material as plaintiff's proof and defendant's rebuttal are completely interwoven. In this case the very statistics relied upon by plaintiff to establish a *prima facie* case formed the basis of defendant's rebuttal of it, i.e. that the statistics were not reliable.

Further, the district court correctly identified the ultimate burden upon the plaintiff, to prove intentional discrimination by a preponderance of the evidence. *Cf. Burdine*, 450 U.S. at 252–53, 101 S.Ct. at 1093. The district court concluded plaintiffs failed to meet this burden.

[37] Although concurring in the proper legal standard, we disagree with the district court on a plethora of subsidiary issues. Specifically, once we examine the conclusions made by the court below as to the government's arguments, it is apparent as a matter of fact and law that the government failed to rebut plaintiff's evidence of discrimination. Accordingly, we proceed to consider those issues in dispute.

B. *Plaintiffs' Case*

1. *"Impact"*—The Statistical Evidence

At trial plaintiffs introduced a wealth of statistical evidence to show the vastly disproportionate impact of the government's detention policy on Haitian, as opposed to non-Haitian, immigrants. *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465; *Castaneda v. Partida*, 430 U.S. at 494–96, 97 S.Ct. at 1280–81, 51 L.Ed.2d at 510–11. Additional statistical evidence from a New York case, *Bertrand v. Sava*, 684 F.2d 204 (2d Cir.1982), was introduced to show that certain factors suggested by the government to explain the disparate impact, such as family ties or

documentation, bore little relation to chance of parole.[31] Plaintiffs then offered the testimony of Dr. Howard Seth Gitlow, Professor of Statistics, to explain the statistical significance of the data.

The test here employed is not so confusing as the parties make it appear, nor is it unfamiliar in cases of this nature. *See Castaneda v. Partida*, 430 U.S. at 496–97 n. 17, 97 S.Ct. at 1281 n. 17, 51 L.Ed.2d at 512 n. 17 (application of standard deviation analysis). Dr. Gitlow employed binomial analysis to statistics showing Haitians versus non-Haitians detained and paroled. The purpose of this test is to show how many Haitians one would expect to find detained or paroled based upon the government's treatment of non-Haitians.[32]

The standard deviation, a final expression of binomial analysis, is nothing more than a measure of the difference between the predicted number and the actual number. "As a general rule for [] large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," then we suspect an unexplained factor, in this case discrimination, is responsible for the difference. *See Castaneda v. Partida*, 430 U.S. at 496–97 n. 17, 97 S.Ct. at 1281 n. 17, 51 L.Ed.2d at 512 n. 17.

The statistical evidence offered by plaintiffs and analyzed by Dr. Gitlow came from three specific sources. The first source was the secondary inspection logs at the airport in Miami between August 1981 and April 1982. Secondary inspection occurs if upon initial encounter with an Immigration officer there is some doubt as to an individual's right to enter. For comparison this evidence was compiled in two separate time frames. Plaintiff's exhibit 187 reflected secondary inspection between August and December, 1981, and separated the statistics for both Haitians and non-Haitians into "paroled," "paroled for exclusionary hearing," "deferred inspection" and "detained."

Dr. Gitlow then testified concerning the binomial analysis performed with the statistics. He computed standard deviations based on three separate compilations, each collapsing the parole categories in a different way in order to ensure no method more accurate than another was neglected. Dr. Gitlow found in each of the three compilations that the chance of so many more Haitians than non-Haitians being detained, or so many fewer Haitians paroled was "on the order of less than two in ten billion times." 53 Tr. 2948. In some cases it was "far less than one in ten billion," *id.* at 2949, or "a statistical joke." *Id.* at 2950.

The second set of data, provided by the government, was from INS District VI, which encompasses the south Florida region. The data reflected persons placed in exclusion proceedings or in an exclusion category who sought entry between the period August 1, 1981 and November 1, 1981. The data was coded by nationality, documentation, attempted entry, date of parole, length of detention, whether an asylum claim was filed, family ties, and comments. *See* Px 189.

Dr. Gitlow provided binomial analysis on a number of compilations of the District VI

31. The government objected to the evidence from *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982), and the opinion below, on the grounds that the populations compared to prove discrimination were not comparable. Plaintiffs introduced evidence, however, to refute government arguments concerning relevant factors in a parole determination. In this regard the Second Circuit's reversal of the district court in *Bertrand v. Sava* supports, rather than harms, the plaintiffs' case. *See* discussion *infra* at 1496–1499.

32. Binomial analysis takes the number of non-Haitians paroled out of a given universe, computes this as a percentage, multiplies that percentage with the total Haitians in the universe and compares this final number with the Haitians actually paroled. When those numbers differ it raises the presumption that a non-random factor, in this case discriminatory intent, was at work in determining who should be detained or paroled.

data.[33] Plaintiffs also built "worst-case scenarios" in which they progressively biased the figures in favor of the government.[34] The purpose of the extensive analysis of the District VI data was to evaluate not only detention versus parole, but also length of time in detention prior to release or final determination. Dr. Gitlow again could only explain the disparate impact of the new policy in a random world as "remote," "statistically significant," or a "statistical joke." *See* 53 Tr. 2951–68. In all of these cases Dr. Gitlow declined to calculate the standard deviation because "it would be so large that my calculator would not hold the numbers." *See e.g.*, 53 Tr. 2965.

Because the government contended, as we discuss *infra*, that the statistical evidence failed to take into account certain "significant" factors, Dr. Gitlow next performed multivariate, or Chi-squared, analysis on the District VI data to control for one of those "significant" factors, that being documentation status. Out of the twenty or more different tests performed only one result fell outside the "suspect" levels of *Castaneda v. Partida*, while most standard deviations were twenty or greater.[35]

The third data set examined was from the government's computer system at Krome North. This data covered detention and parole for a period between January and April 1982. Plaintiffs introduced this evidence with "strong reservations with respect to the data," 53 Tr. 3040, because they never saw the underlying figures and were aware the computer did not include the entire relevant population. Nonetheless, the lowest standard deviation calculated by Dr. Gitlow was 7.64, well outside of the *Castaneda* "two or three standard deviations" range.

Finally, Dr. Gitlow analyzed statistics introduced by the government. During the course of the government's testimony, plaintiffs raised serious questions as to the validity of that data. *E.g.*, 54 Tr. 3176–78. Nevertheless, Dr. Gitlow's testimony concerning the statistics was every bit, if not more, damaging than his testimony concerning plaintiffs' statistics. *See* 54 Tr. 3251 et seq.

Plaintiffs' statistical evidence showed a severely disproportionate impact upon the plaintiff class. We venture to say that this impact revealed a "pattern [of discrimination based on nationality] as stark as that in *Gomillion* [*v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960);] or *Yick Wo* [*v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)]." *Arlington Heights*, 50 L.Ed.2d at 465. Despite the fact that this

33. For example, in one case aliens turned over to the Federal Drug Enforcement Administration might be excluded from the analysis, and in another they might be treated as detained. *See* 53 Tr. 2964–65.

34. Despite the government's continuing objection to characterization of data compilation as "favoring the Government," *e.g.*, 53 Tr. 2929, 3022, plaintiffs' representations to this effect obviously were correct. For example, if any non-Haitian's status was doubtful, but plaintiffs counted them as "detained," as a matter of simple mathematics it skewed the results in favor of the government; likewise if a Haitian's status was doubtful, but he was counted as paroled. One dramatic example of this procedure was when Dr. Gitlow added in as detained all non-Haitians who withdrew or were paroled to DEA or the U.S. Marshal. Compare Px. 191, table 4 *with* table 5. The effect of including these questionable cases was a drop from 49.2 to 20.35 standard deviations.

35. Standard deviation is an expression that measures an exponential deviation. Therefore, the difference between 2 and 3 standard deviations, let alone between 2 and 20, is much more significant than it would seem to an uninformed reader. Dr. Gitlow explained at trial:

> I would just like to demonstrate if there are more than three standard deviations above the mean, what the likelihood is and then I will calculate it at four, and that will explain it better than I can explain it.
>
> The chances of being greater than the three standard deviations are about one in a thousand. The chances of being the four standard deviations above the mean is about three in a hundred thousand. So, the one in a thousand versus three in a hundred thousand and when I go out to five, [sic] it is not much different between five and ten standard deviations. It is just all remote.

53 Tr. 2988.

alone establishes a prima facie showing of discriminatory intent, *see id.* (impact alone will suffice to prove prima facie case when pattern that emerges is stark), plaintiffs also introduced considerable evidence of other *Arlington Heights* factors.

2. *"Other Evidence"*

[38, 39] In addition to the statistical evidence plaintiffs introduced a plethora of "other evidence" of discriminatory intent, as permitted under *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465–66. The district court's opinion described nine categories of admissible evidence relevant to discriminatory purpose, *Louis III* at 999–1000, but of these the court evaluated only two: historical background and departure from the normal procedures. The court found no substance to plaintiffs' contentions as to either of these categories. Plaintiffs cite this as error, urging that we hold the findings clearly erroneous, and recognize the other evidence under *Arlington Heights*.

Plaintiffs point to record evidence under three particular *Arlington Heights* factors: historical background, procedural and substantive departures, and administrative history. Although it is not readily discernible from a reading of *Arlington Heights* and the cases cited therein what evidence is pertinent to each factor, the evidence generally is valuable if it establishes an ongoing *pattern* of discrimination against the plaintiff class. 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465. We hold the district court erroneously disregarded evidence of these factors.

Under the "historical background" factor, plaintiffs introduced evidence of numerous lawsuits initiated in the past to challenge disparate treatment of Haitian immigrants. *See Sannon v. United States*, 427 F.Supp. 1270 (S.D.Fla.1977) (political asylum claims in exclusion as opposed to deportation hearing); *vacated and remanded without opinion*, 566 F.2d 104 (5th Cir.), *vacated as moot*, 631 F.2d 1247 (5th Cir.1978) (INS' newly promulgated regulations offer same relief as that ordered by district judge); *National Council of Churches v. Egan*, No. 79–2959–CIV–WMH (S.D.Fla. Aug. 29, 1979) (Haitians work authorizations); *Haitian Refugee Center v. Smith*, *supra* (asylum claims of deportable aliens); *Louis v. Meissner*, 530 F.Supp. 924 (S.D.Fla.1981) (*Louis I*) (access to counsel, fair hearings, erroneous deportation).

Further, the testimony of numerous witnesses, including well-regarded members of the immigration bar and former high-ranking INS and Department of Justice officials, attested to persistent targeting and mistreatment of Haitian immigrants. *See* Px 109A (memorandum from David Yeres, Deputy Associate Attorney General to David Crosland, General Counsel, INS) (8 May 1979) ("we should strive to end the double standard that now seems to prevail between the handling of these Haitian [work authorization] claims and those made by others"); testimony of Charles Gordon (former General Counsel, INS, and recognized immigration expert) 38 Tr. 140, 157–58 (mass hearings); testimony of Monsignor Walsh (Administrator, Catholic Relief Agency and refugee expert) 38 Tr. 260–64 (discriminatory policy re: asylum claims of Haitians); Testimony of Sam Bernsen (former General Counsel, INS) 38 Tr. 216 (special detention and release policy toward Haitians prior to 1977); testimony of Ira Gollobin (immigration lawyer; counsel to National Council of Churches) 40 Tr. 646 et seq. (history of NCC struggle with government to ensure fair treatment of Haitians); testimony of Maurice Ferre (Mayor of the City of Miami) 41 Tr. 787, 789, 795–96 (discussions with Administration officials over course of time concerning disparate treatment of Haitians and Cubans; resolution of Miami City Council urging end to disparate treatment); testimony of Larry Mahoney (Public Affairs Officer, U.S. Department of State, Cuban-Haitian Task Force, July 1980 to May 1981) 43 Tr. 1140–43, 1148–50, 1168 (disparate treatment of Cubans and Haitians in camps; telephones for Cubans, Cu-

bans had recreation facilities, left camp for theatre, parents remained with minor children—not true of Haitians); testimony of Jacqueline Rowe (Equal Opportunity Officer for Community Action Agency of Metro-Dade County) 44 Tr. 1355–72, 1385 et seq. (differing arrival procedures for Cubans and Haitians).[36] All told, this unrebutted and unexplained testimony shows an historical pattern of discrimination under *Arlington Heights*.

[40] The district court's discussion of this factor displays a misapprehension as to its purpose.[37] The court rejected the evidence of prior cases stating "[p]laintiffs be-

36. One portion of Ms. Rowe's testimony is telling of the treatment to which Haitians historically were subjected. These events occurred in early autumn 1980:

> "As I mentioned, there was a young man on that particular day whose story seemed to indicate that he needed to fill out a form for political asylum. And because that could not be done by the INS officer at the Miramar site, I accompanied him to the INS site on Southwest First Street.
>
> ....
>
> "We went inside the building from the Southwest First Street entrance. There was a sign that said, Haitians to the rear, and I did not really quite understand.
>
> "I took the elevator upstairs. There was no rear—
>
> Q. Was that in English or in Creole, the sign?
>
> A. "It was in English. I went up to the second floor of the building with the young man. I was told what that meant was that I had to go out of the front of the building and walk around to the back of the building and stand outside in line.
>
> "Now, first I was concerned about it because right where I was there were INS officers and there were Cubans and they had some questions and they were given a number and I took a number and I went up to the desk and I said—I told them what my story was, and they said you have to go outside of the building. You stand in line outside the building and somebody will help, come out there to help you.
>
> "I did go back outside....
>
> "[T]here were a group of 150, maybe 200 Haitian refugees who were standing in line outside in the sun. It was in the middle of the summer and it was hot and they stood. They just stood.
>
> "And I stood, too, for a while with the young man, but I really did not have much time. There was no INS officer, no staff out there.
>
> "So, after standing there for a while, I went back inside the building to tell them that if I was supposed to be standing outside waiting for somebody in the back of the building [sic].
>
> "There was, in the building, there was a stairway that led to the back door of the building, and we were told to stand on the stairway and wait. I went back inside to tell them there is nobody out there and when I went back inside, I opened the door to go in and two INS staff people—oh, I was not the only one there. There was a group of people there, and they were pushing us all down, you know, that kind of treatment. I mean, really, that's what happened to us.
>
> "By that time I said to the INS officer, "What are you doing? I think this is archaic."
>
> "And he said, 'Oh, I'm sorry,' as if to say, 'Oh, well, you speak English.'
>
> "He said, 'I'm sorry, what are you here for?'
>
> "And I explained to him why I was there. And he said:
>
> " 'Let me take the name of the young man who you are with and I will come out and I will call you.'
>
> "So we went back to the first floor out around the back, stood again outside with these other couple of hundred people out there, some with babies, sitting on the stoop.
>
> "There were no bushes, it was sun, and mothers, you know, with babies, and children and there were just people all over and nobody came out.
>
> "And I eventually just left and reported back to the INS Deputy Director, who at that time, I believe, was Mr. Galudge (phonetic)."

44 Tr. 1384–87.

37. The district court's misunderstanding of this factor had an impact upon the trial itself. Ira Gollobin, counsel to the National Council of Churches, was testifying to that organization's struggle over a number of years to obtain equal treatment for the Haitians. He testified concerning a period of ten years prior to this litigation, concentrating on the period prior to the Settlement agreement entered into between the Government and the Council in 1977. This string of ten years during which Mr. Gollobin could testify to persistent mistreatment was obviously relevant under the historical background factor of *Arlington Heights*. Nevertheless, the district judge cut short the testimony concerning events in 1973 saying: "Let's not make it too historical. We are talking about nine years ago. Let's not get into too much detail and move forward." 40 Tr. 646. This is the sort of evidence ignored by the district court in its opinion, yet the citation of authority

lieve, and would like this Court to conclude, that the practices challenged herein are a mere continuation of the prior INS policy against excludable instead of deportable Haitians." *Louis III* at 1001. Rather, the judge found the practices were a result of the "increased flow of Haitians to South Florida during the years 1977 to 1980 and by the massive influx of Cubans during the boatlift in 1980."[38] The issue, however, is not whether this is a continuation of a former policy, but whether plaintiffs are able to introduce sufficient evidence of past discrimination against the class to support an inference that the current disparate impact too is a result of discriminatory intent. *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465 (historical evidence relevant particularly if it "reveals series of official actions taken for invidious purpose"). There is certainly sufficient unrebutted testimony to support such an inference in this case. In misapprehending the purpose of historical background, the district court failed properly to credit this evidence.

[41] Departure from the normal procedural sequence may refer to the administrative sequence for formulating policy, or it may refer to the procedural sequence of exclusion adjudication to which plaintiff class members were subject.[39] In this case the latter surely permits an inference of discriminatory intent. Plaintiffs introduced evidence to describe numerous departures from the normal exclusion procedure described heretofore. Plaintiffs were served with I–122's[40] before they could present asylum claims to the District Director, *infra*, at 1507–1508, were subject to mass exclusion hearings behind closed doors, were found excludable in hearings in which the translators failed to translate Creole properly, *see supra* at 5, and in some instances were deported in a manner INS itself admits was faulty. *See generally Louis I*, 530 F.Supp. 924, *passim*. This evidence also was largely unrebutted and at least in one instance INS conceded its error. *Id.*

The district court, however, disregarded this evidence. It stated "[p]laintiffs were subjected to these new procedures but they were not alone." *Louis III* at 1001–02. This conclusion is clearly erroneous. Outside of "mere protestation" INS introduced no evidence that any group other than the Haitians was subjected to these questionable practices. Not surprisingly, the government points to no such rebuttal evidence in its brief.

by the Supreme Court in *Arlington Heights* indicates a ten-year period may well be relevant. *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465, *citing Griffin v. School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) (detailing racial discrimination over ten-year period).

38. The first reason, the "increased flow" is, of course, unsupported by the evidence. As we note throughout the opinion, the Haitian flow was not more than 2% of the illegal immigration flow, yet the government failed altogether to introduce evidence of similar procedures used on non-Haitian immigrants. The second reason, "the massive influx of Cubans," is irrelevant to this litigation, though we perceive one underlying message of the entire litigation is that the Haitians were treated as they were as a result of the sudden Cuban migration during the Mariel boatlift.

39. The *Arlington Heights* opinion does not elucidate upon which of these properly are considered, stating only "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." 429 U.S. at 268, 97 S.Ct. at 565, 50 L.Ed.2d at 466. We believe evidence of either departure from standard adjudication procedures or administrative decisionmaking might permit an inference of discrimination, but it is the former that is more significant in this case. To the extent that immigration was a problem of national dimensions, it was not unusual for the Executive Branch deal with it in a unique way, and this alone would not suggest discriminatory intent toward the Haitians.

40. An I–122 is the notice served upon an alien requiring him to appear for an exclusion hearing. Once the alien is served with an I–122 there may be no further "extra-judicial" contact between INS and the alien, thereby foreclosing an application for asylum before the district director.

The district court also ignored evidence under the factor plaintiffs refer to as "procedural sequence" of the administrative process formulating the Haitian policy. This evidence is relevant, although it more properly is considered under the *Arlington Heights* factor "administrative history," (both before and after adoption of the new policy). We find no fault with a Presidential Task Force to deal with problems of national import such as immigration; we are concerned with the pages of documents acquired by plaintiffs in discovery that indicate a special discriminatory "Haitian Program."

The import of these documents is dependent upon reading them in context. First, it is helpful to note the INS code number for Haitians. Some documents do not specifically mention Haitians but merely assign the document by code to the Haitian file. The code number is CO 243.85. It appears on a variety of documents alarming as to both their number and content. *See e.g.*, Px 80 "Report as to status of space for detention and prior surveys" (David Croland, General Counsel INS to David Hiller, Special Assistant to the Attorney General, 19 May 1981); Px 86 "Contingency Plan for the Detention of Cubans/Haitians in Florida and Other Locations" (Hugh J. Brian, Acting Assoc. Comm'r., Enforcement to Doris Meissner, Deputy Commissioner, 27 April 1981) (specifically referring to eliminating the right to apply for asylum to the District Director); Px 92 "Cuban/Haitian Policy" (Croland to Hiller, 2 April 1981) (detention of Haitians and Cubans); Px 94 "Haitian Policy" (Croland to Kenneth Starr, Counselor to the Attorney General, 20 March 1981) (deprive right of asylum before District Director; detention for Haitians despite fact appeal process could extend over one year).

Second, it is helpful to bear in mind the "protestations" of INS officials, discussed more fully, *infra*, that the policy was intended to be applied "across the boards," but had its greatest impact on Haitians because no one else was "similarly situated." Plaintiffs' documents belie this. *See, e.g.*, Px 71a "Memorandum on President's Task Force" (Hiller to Task Force, 19 May 1981) (annual illegal inflow estimated at 500,000; Mexicans account for about 80% of total); Px 71b Issue Paper, "What Policy should the United States adopt with regard to foreign persons who enter South Florida without visas?" (same; Haitians account for "probably less than two percent"); Px 93 "Detention Policy ... Cubans ... and Haitians" (Nelson, Phillip Hawkes, Director, Office of Refugee Resettlement, INS to Guiliani, 15 December 1981) (drastic drop in Haitians compared to 1980).

Third, the government consistently argued against judicial interference with its uniform policy adopted by the President in the summer of 1981. Yet, plaintiffs' documents show the efforts and practices here at issue were instigated some time before that. The initial administrative discussions also seem to indicate a target identified previously to the summer of 1981. *See e.g.*, Px 77e "Processing of Haitian Cases in Miami District" (Charles Sava, Associate Comm'r, Enforcement to Mario Noto, Deputy Comm'r, 14 July 1978) (most effective deterrent to immigration is expulsion of Haitians in the country; Enforcement to take the lead in getting hearings moving swiftly); Px 77d "Haitian Program" (Richard Gullage, Acting District Director, Miami to All Employes, 23 August 1978) (Haitian cases cannot be delayed in any way; staff to take whatever action necessary to keep cases moving); Px 77b "Haitian Undocumented Aliens" (Note to Castillo, Commissioner, INS 20 July 1978) ("If, in accordance with policies to be established, the Haitians may be amenable to detention, ...").

Finally, there are the documents that indicate the understanding of at least some Administration officials that the new policy was not to be applied universally. The best example of this is Plaintiffs' Exhibit # 1, a Telex from the Regional Commissioner,

Dallas to INS District Director, New Orleans, INS Associate Commissioner for Enforcement, and INS Associate Commissioner for Detention and Deportation, on September 2, 1981:

> PRIORITY
>
> BE ADVISED CURRENT SERVICE POLICY ANT SOUTHERN REGION POLICY RE (HAITIANS) APPLICANTS FOR ADMISSION/ASYLUM REQUIRE THEY BE DETAINED PER I & NA 235(B) AND 8 CFR 235.3(B).

(parenthetical in original).

[42] All told plaintiffs mustered an impressive array of witnesses and an equally impressive number of documents to demonstrate circumstantially, and to an extent, directly, intentional government discrimination against Haitians. This evidence, in addition to the statistical evidence, was unrebutted but for the government's testimonial evidence, which can at best be termed "mere protestation." Without evidence of similar mistreatment of other immigrant groups, the district court had no factual basis for finding these practices were directed at others, or that they would be directed to others who were similarly situated. Based on the lack of evidence, the district court's findings are clearly erroneous.

C. *The Government's Case*

1. *Methodological Challenge—The Statistical Evidence*

By way of rebuttal the government challenged the methodology employed by plaintiffs to prove impact. The essence of the government's claim was, and is, that binomial analysis is inappropriate to prove impact because parole is not a random process. The district court accepted this argument, disregarding the impact demonstrated by the statistical evidence, stating "parole is not a random process and the probability of parole is not the same for every person," *Louis III* at 983. For an abundance of reasons we uphold the methodological validity of plaintiffs' statistical analysis.

The Supreme Court has recognized the validity and value of statistical analysis in cases of this sort. "[C]ur cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *Teamsters v. United States*, 431 U.S. 324, 338–39, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396, 417 (1977) (citation omitted). The government generally concurs but argues this case differs from the traditional discrimination case employing statistics such as a jury selection case, because in a jury case selection of a jury is a random process whereas parole from detention is not.

[43] Despite the fact that the government fails to articulate cogently its objection to the use of binomial analysis in a non-random situation, we understand the theoretical difficulties. As we explained, *supra*, binomial analysis compares a result expected in a random world with what actually occurred and then presumes some unspecified force is at work if the actual result differs significantly from the expected result (measured by the standard deviation). In discrimination cases the inference is that intentional discrimination is this "unspecified force." The government contends such analysis is inappropriate to this case, however, because parole is not a random process. It argues the deviation between expected numbers of Haitians detained or paroled from what is actually occurring could be explained in any number of ways other than intentional discrimination. Specifically, the government argues parole depends on a number of finely-tuned factors or "qualifications," and the disparity in numbers of Haitians and non-Haitians incarcerated is accounted for on the grounds that the Haitians do not qualify under the parole standards. For seven different reasons, the government's argument fails to measure up under either the law or the facts of this case.

The first problem with the government's position is that Supreme Court has relied on

statistical evidence in situations not wholly random. Although the government offers jury selection as the epitome of randomness the fact is that the selection method at issue in *Castaneda v. Partida* was not a random one. The Supreme Court in *Castaneda* acknowledged that the "key-man" jury selection system at issue was "highly subjective." *Castaneda v. Partida*, 430 U.S. at 497, 97 S.Ct. at 1281, 51 L.Ed.2d at 512.[41] Nonetheless, the case was decided primarily on the basis of statistics analogous to the ones before us. *Id.*, at 495–97, 500, 97 S.Ct. at 1280–81, 1283, 51 L.Ed.2d at 511–12, 514. The Supreme Court likewise has accepted binomial analysis in employment discrimination cases where it is undisputed that a lack of qualified plaintiffs may explain statistical disparities as well as an inference of discrimination on the part of the employer. For example, in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), the Court relied on statistical evidence of disparities between minorities in the population-at-large and minorities employed as drivers as evidence of discrimination. *Id.* at 338–41, 97 S.Ct. at 1856–57, 52 L.Ed.2d at 417–19. Although qualifications were not generally at issue in *Teamsters*, petitioners did raise qualification arguments similar to those the government advanced here. *Id.* at 342 n. 23, 97 S.Ct. at 1858 n. 23, 52 L.Ed.2d 419 n. 23. In response the Court stated:

> In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from "the inexorable zero."

Id. (citation omitted).

[44] This is not to say the Supreme Court has ignored the question of qualifications when using binomial analysis; quite the contrary is true. The Court has had occasion to note that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population ... may have little probative value." *Hazelwood School District v. United States*, 433 U.S. 299, 307, n. 13, 97 S.Ct. 2736, 2742, n. 13, 53 L.Ed.2d 768, 777 n. 13 (1977). Here, however, the government altogether ignored the body of jurisprudence concerning proof of, and analysis of, special qualifications while blindly asserting binomial analysis is never appropriate in a non-random situation. That is certainly not the case.

[45, 46] Second, we emphasize that plaintiffs may prove a prima facie case without accounting for qualifications when the statistical impact is sufficiently glaring. This we established in *Fisher v. Procter & Gamble Manufacturing Co.*, 613 F.2d 527 (5th Cir.1980), *cert. denied*, 449 U.S. 1115, 101 S.Ct. 929, 66 L.Ed.2d 845 (1981):

> Mindful of [the admonition in] *Hazelwood* [concerning proof of special qualification], we nevertheless find the plaintiff's statistics adequate to establish a prima facie case. First, a prima facie case may be shown without evidence of qualifications where the inference of discrimination is supported by a compelling level of racial underrepresentation in a sizeable work force. In *Hayes International Corp.*, [456 F.2d 112 (5th Cir.1972)] we noted that when substantial underrepresentation is shown as compared with general population figures, the burden of proving lack of qualifications is on the Company.

Id. at 544 (citation omitted). And, there is good reason for this. Requiring too much

41. Under Texas' "key-man" grand jury system the jury commissioners select 15–20 people to comprise the list from which the grand jury is chosen. 430 U.S. at 485, 97 S.Ct. at 1275, 51 L.Ed.2d at 504. Those chosen then appear in court to have their "statutory qualifications" tested. *Id.* at 485, 97 S.Ct. at 1275, 51 L.Ed.2d at 504–05. Significant to the decision in *Castaneda* is the fact that absent testimony from the commissioners as to the qualifications they employ in choosing their list it is impossible to know the basis on which that list is chosen. *Id.* at 499, 97 S.Ct. at 1282, 51 L.Ed.2d at 513. As we hold, *infra*, a similar situation is present here. Although qualifications for parole may exist we cannot discern them absent uniform testimony from those individuals responsible for parole policy or implementation explaining what relevant qualifications are examined.

proof initially from a plaintiff may defeat a valid claim of discrimination before its validity is discerned. Allowing proof of the prima facie case with glaring statistics, however, does not unduly burden a defendant. The defendant, in rebuttal, can prove the unaccounted-for qualifications, thereby undermining plaintiff's case. *Cf. Vuyanich v. Republic National Bank of Dallas*, 505 F.Supp. 224, 356 n. 169 (N.D.Tex.1980). In this case plaintiffs not only introduced "compelling" statistical evidence, they introduced substantial "other evidence" under *Arlington Heights* as well. We must accept plaintiffs' prima facie case as established; it behooved the government to rebut the case, if it were able, by introducing evidence of those unaccounted-for parole qualifications.

Third, it is nonsensical to require plaintiffs to establish qualifications of the plaintiff class when the relevant qualifications were vague, uncertain or unknown. The district court could not state the detention/parole policy with any certainty. The district court found that no guidelines for parole were ever promulgated. The district court stated that because of the lack of guidelines government witnesses described one policy while their subordinates enforced another. *See Louis III* at 981 n. 24.

[47, 48] Yet, despite its inability to locate a written parole policy, and its inability to specify exactly what the policy was, either of which would indicate those qualifications important to a parole determination, the court below swept away plaintiffs' statistics on the basis that they did not reflect the relevant qualifications. The district court stated:

> Factors that may be considered include the age and health of the alien as well as the reason he does not appear entitled to enter this country. Other factors include being accompanied by a minor and pendency of an I–130 application. These factors, with the exception of documentation, were not separately analyzed by Plaintiffs' expert. With regard to his analysis of the significance of possessing documents it was far too simplistic because it did not distinguish between the types of documents possessed and the facial validity thereof.

Louis III at 982. This determination is clearly erroneous and wholly unsupported by the evidence. *Pullman Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). It also conflicts with the district court's own determinations concerning the APA claims, determinations which for the most part we uphold. Although factors similar to those mentioned by the district court were suggested piecemeal during the course of the trial, there is no evidence to suggest they formed a coherent policy.[42] Rejecting a well-supported claim of discrimination on the basis of vaguely-asserted and ill-defined qualifications represents a clear error of law and fact.

[49] Fourth, even had those factors relied upon by the district judge uniformly and consistently been offered by government witnesses they would be insufficient proof of additional parole qualifications. The law is clear that "mere protestation" is insufficient to rebut a plaintiff's prima facie case. *E.g., Castaneda v. Partida*, 430 U.S. at 499 n. 19, 97 S.Ct. at 1282 n. 19, 51 L.Ed.2d at 513 n. 19; *Alexander v. Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226–27, 31 L.Ed.2d 536, 543 (1972). Yet, the record contains nothing more than the self-serving testimony of high government officials that the policy was not intended to be discriminatory, *see, e.g.*, Nelson testimony, 47 Tr. 1972–73; Guiliani testimony, 49 Tr. 2343, as well as a variety of vague, contradictory statements concerning parole fac-

42. In December of 1981 INS did publish "Detention Policy Guidelines in Exclusion Cases." *See* Px. 71c. This post hoc rationalization of the government's policy is insufficient to prove a policy implemented in fact in the early spring of 1981. We also note the district court's enunciation of relevant factors differs significantly from these guidelines, which contain no mention of, for example, "the reason . . . [the alien] does not appear entitled to enter. . . ."

tors. *See supra*, at 1470–1473 (disagreement among government officials as to policy).[43] Beyond this, the record is clear that whatever the officials responsible for policy formulation intended, those intentions never were conveyed to immigration officials responsible for implementation of the policy.

[50] Fifth, the government failed to demonstrate that parole decisions were made in a non-discriminatory manner. Although the evidence at trial was clear that parole decisions were made, if at all, at a rather low level of authority in the immigration corps,[44] the government declined to offer as a witness any individual who could explain or demonstrate exactly which factors were considered in granting parole. *See Castaneda v. Partida*, 430 U.S. at 497–99, 97 S.Ct. at 1281–82, 51 L.Ed.2d at 512–13 (discussing value of jury commissioner testimony to rebut statistical evidence of discrimination). In this regard the opinion of the Second Circuit in *Bertrand v. Sava*, 684 F.2d 204 (2d Cir., 1982) is instructive. In *Sava* the Court of Appeals admonished the district judge for substituting his judgment for the discretion of the District Director, *who took the stand to explain in specific cases why members of the plaintiff class were not paroled.*[45] The record before us is devoid of any such evidence.

[51–53] Sixth, shifting the burden to the government to establish special qualifications especially is appropriate when the data necessary to evaluate alleged qualifications is uniquely in the government's possession and when, as here, plaintiffs have

43. The government cites *United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir.1982), for the proposition that testimony alone is sufficient to rebut statistical evidence of discrimination. In *Perez-Hernandez* the criminal defendant challenging selection of the grand jury foreman established through statistical evidence a prima facie case of discrimination. In rebuttal eight district judges testified as to the criteria used in choosing a foreman. "Each judge testified that he acted independently of the other judges in choosing a grand jury foreman, although each employed similar guidelines in making a selection." *Id.* at 1387. The record indicated no evidence the judges ignored the stated criteria or chose non-minorities over equally qualified minority jury members. *Id.* at 1388.

Perez-Hernandez is distinguishable from this case. First, there is no basis for the "qualifications" evidence found in the testimony of the government witnesses in this case. The district judge himself stated no one witness offered the same criteria. Further, those criteria never were communicated to the INS officers actually granting or denying parole. By contrast, in *Perez-Hernandez* those actually charged with discrimination testified. Second, there was no evidence in *Perez-Hernandez* that refuted the rebuttal testimony. The record before us is replete with testimony contradicting the good-faith affirmations and self-serving criteria of government witnesses. Testimony alone is insufficient when there is little reason to credit it, and when the record gives rise to serious question as to the validity of that testimony. In that situation, the testimony must be supported by proof. In this case the government produced no evidence that the policy criteria were communicated to INS officers, nor did it provide testimony as to the basis of a parole decision in any given case.

44. The alternative formulation suggested by the district court was that the new policy as announced withdrew from the district directors all discretion to parole undocumented Haitians. The district court cautioned that any regulations promulgated in response to its final order that had this effect would be violative of due process, *Louis III* at 1001–02 n. 52. As we have no due process claim before us we venture no opinion as to the district court's analysis.

45. We are mindful of the language in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), to the effect that proof of non-discriminatory individual actions need not bind a court where the concern is proving a pattern of discrimination. *Id.* at 343 n. 24, 97 S.Ct. at 1858 n. 24, 52 L.Ed.2d at 420 n. 24. Here, however, the government challenges plaintiffs' failure to present a statistical case that takes special qualifications into account. In this instance proof of what those qualifications were, and that they were applied, would have been beneficial, *see Castaneda*, 430 U.S. at 499, 97 S.Ct. at 1282, 51 L.Ed.2d at 513 (jury commissioner testimony), particularly when the evidence offered showed no qualifications were promulgated or communicated to immigration officials allegedly applying those qualifications.

requested and not received the necessary data. Almost all the data analyzed by plaintiffs' expert came from the government in response to discovery requests. We have scrutinized that data; for the most part it is lacking entirely in information sufficient to permit qualification analysis. As a general rule we will not penalize one party for failing to explain or present data uniquely in the possession of the other. *See Reed v. Rhodes*, 607 F.2d 714, 735 (6th Cir. 1979) (party may not complain of district judge's misuse of data they provided, particularly when opportunity existed to explain correct figures), *cert. denied*, 445 U.S. 935, 100 S.Ct. 1329, 63 L.Ed.2d 770 (1980).[46] It was error to hold plaintiffs responsible for any failings of the data.

Seventh, despite the fact that the alleged qualifications never were cogently described by the government, and that the government never produced data susceptible to qualification analysis plaintiffs anticipated and adequately met the government's statistical challenge. Plaintiffs offered a variety of statistical and testimonial evidence to demonstrate that qualifications were irrelevant. Dr. Gitlow analyzed the data from a similar case in New York, *Bertrand v. Sava*, 684 F.2d 204 (2d Cir.1982). The statistical data from *Sava* certainly suggested that documentation, asylum and family ties had little or nothing to do with the release of some 107 non-Haitians arriving after May 20, 1981.[47] 45 Tr. 1631 et seq. Next, Dr. Gitlow performed multivariate analysis on the District VI data and there again demonstrated document status had little to do with detention or parole.[48] Finally, Robert Boyer, an immigration attorney involved with Nicaraguan applicants for asylum and

46. The district court stated "[t]he decision to grant a deferred inspection takes into account many factors not contained in the data analyzed by Plaintiffs' statistician." *Louis III* at 983. Having so stated the facts, however, the district court failed to give them appropriate credence. Not only was information necessary to do qualification analysis not in the data Dr. Gitlow analyzed, but all of the necessary data was in the government's possession. It certainly is not the fault of plaintiffs that the data they analyzed was insufficient; plaintiffs vigorously fought to obtain all relevant data the government possessed. Despite untold discovery requests and motions, the government produced only that data analyzed. In fact, a fair portion of the data was produced while trial was in progress, on occasion the day the data was to be discussed in court. Further, the very fact that immigration records are not readily susceptible to qualification analysis casts doubt on the relevance of the suggested qualifications.

It would be inaccurate to represent that the government's records were entirely lacking in information concerning family ties, asylum claims, etc. The truth is that the quality of the data evaluated differed drastically, presumably because of files lost, or differences in those completing the files. It is equally apparent, however, that when that data was available it did not support the government's position. A quick review of the data indicates the lack of correlation between the asserted qualifications and parole. We stress, however, that we are not deciding the case on an independent view of the data. Because the data is so uneven in quality we are excusing plaintiffs from any burden to have attempted qualification analysis.

47. The government challenges the use of the *Sava* data, but its grounds are inapposite. The district judge in *Sava* was reversed for substituting his judgment for that of the district director. What distinguishes *Sava* is there the district director testified, proved his involvement in parole decisions, enunciated what factors he considered, and in what manner. The Second Circuit held that the district court's second-guessing of the district director on this issue was inappropriate. Here, we have no testimony from any party admitting involvement in the parole decisions. The district director in Miami specifically testified that he had delegated his parole authority, 48 Tr. 2156, Howerton Dep. at 12, and could not say specifically what the parole criteria were. 48 Tr. 2159. The delegees did not testify.

48. The district court believed Dr. Gitlow's document analysis was "far too simplistic" in that it did not distinguish between type of document and whether it was a case of fraudulent documents or non-existent documents. Yet, the data coding sheets agreed upon by the parties call for a (U) for undocumented, or a (D) for documented. Some entries read D–PP (presumably documented, passport), and then contain in comments "no visa." Further, the role of documents was one more factor about which high-ranking government officials disagreed. *See supra* n. 9.

admission, identified numerous occasions where Nicaraguans arrived with fraudulent documents, or no documents, no claimed family ties, no illness or other disability, yet were released while their asylum claims were pending. 39 Tr. 426, *passim*. As Boyer's testimony was unrebutted, it is evident plaintiffs proceeded much further with a qualification argument than the government would have us believe.[49]

It strikes us plaintiffs managed to disprove a case the government has failed to make in any way other than by mere protestation or arguments of counsel. The government certainly failed to establish the invalidity of plaintiffs' methodology. For the seven reasons enumerated above we approve the proof of impact established by plaintiffs.

2. *Minimizing Impact—Rebuttal*

[54] The government advanced three arguments to explain the disparate impact of its new policy upon the Haitians. Finding merit in these arguments, without according special weight to any of them, the district court found that the apparent disparate impact on the Haitians could be explained "on grounds other than race and/or national origin." *Louis III* at 1000. This was error. Not only are the arguments largely irrelevant, but crediting them rewards the government for its misconduct.

The culprit first identified by the government to exonerate it from responsibility for the disparate impact of the new policy is the district court for the Southern District of Florida. In *Louis I* that court entered an injunction prohibiting the government from holding exclusion hearings for, or from deporting, unrepresented class members. Presumably, because it was enjoined from conducting exclusion hearings for class members, the government was required to hold the Haitians in detention. According to the government, the injunction, and not discriminatory intent, was responsible for the incarceration of a disproportionate number of Haitian immigrants.

As stated *supra*, the injunction was entered in federal district court because the district judge determined plaintiffs had a likelihood of showing on the merits that defendant INS' proceedings in exclusion were "violative of the law." *Louis I*, 530 F.Supp. 924, 929 (S.D.Fla.1981). In addition to numerous instances of misconduct cited by the district judge, the court's findings as to irreparable harm are worthy of quotation:

> Indeed, in an earlier point in these proceedings, INS deported eleven refugees to Haiti pursuant to procedures that the government later agreed were faulty. Unfortunately, the government's concession came too late to assist these eleven individuals. It is to prevent a similar problem that this Court must enjoin the deportation of unrepresented class members.

Id. at 928.

We perceive two enormous difficulties, one factual and one equitable, with the government's claim that the injunction, and not the government, was responsible for the number of Haitians in detention. Factually, there was no reason for the government to continue detaining class members simply because it could not proceed to exclude them. There was always the option of parole, the discriminatory award of which forms the gravamen of this action. The government may not have wished to parole the Haitians, preferring detention as a mat-

49. On cross-examination the government vigorously questioned Boyer concerning the underlying validity of Nicaraguan claims for admission. This was irrelevant. The individuals about whom Boyer testified were all paroled or granted deferred inspection despite document problems and before the underlying merits of their claims were investigated. This suit is not addressed to whether individuals eventually succeeded with an asylum claim or were deported, but with interim events.

ter of policy,[50] but it certainly was not enjoined from exercising its parole powers. The injunction in *Louis I* does not explain adequately the disparate impact.

Second, as an equitable matter we are disturbed the government should ask us to excuse a prima facie showing of misconduct on the basis of an injunction entered in response to other governmental error or misconduct. The injunction was entered in *Louis I* in the face of rather egregious government misconduct. Acceptance below of the injunction in *Louis I* to explain the discriminatory detention of Haitians has the appearance. if not the effect, of condoning the government's earlier misconduct. That is particularly true as the injunction entered in *Louis I* did not require detention, nor did it foreclose parole. Accordingly, it was error for the district court to accept this explanation in rebuttal.

The second culprit allegedly responsible for the appearance of disparate impact is the Immigration and Naturalization Service, which instituted a program of bringing the Haitians before an immigration judge before allowing them to depart voluntarily. The district court found that although individuals from other nations were permitted to withdraw their applications for admission and depart immediately this "voluntary departure" was a slower process for Haitians because of the INS rule. Ostensibly this extra precaution took so much time that it partly explains the enormous disparity between Haitians and non-Haitians detained.

Voluntary withdrawal is a process whereby an alien in exclusion proceedings may decide to terminate those proceedings, "voluntarily withdraw" from our borders, and return from whence he came. Voluntary withdrawal of the Haitians became an issue when the HRC challenged voluntary withdrawals alleging coercion and misrepresentation on the part of INS officials. The Special Master appointed to investigate these allegations found that although a certain number of Haitians withdrawing were doing so voluntarily, this was not universally the case. Master's Report and Recommendations at 12, 15, 16, 18. The Special Master found some Haitians were withdrawing due to the conditions of their detention, some because of despair at continued incarceration and separation from families, and some because of a lack of knowledge of their rights. *Id.* at 12, 15, 17–18.[51]

Voluntary withdrawal, and the INS program inserting an immigration judge into the process, is unrelated to the disparate impact of the new policy. At most this additional process delays departure of withdrawing Haitians a day or so. It might even prevent the departure of those whose "voluntary" withdrawal was in fact coerced. In no way, however, does the special procedure prevent INS from paroling Haitians into the community.[52]

Finally, there is the "asylum" argument. The district court explained:

50. The government's preference was apparent from the trial testimony. When asked at what point the government planned releasing the Haitians, Commissioner Nelson responded that would be as soon as the injunction was lifted and they could be excluded, then deported. 47 Tr. 1983.

51. The Special Master described the Haitians he interviewed in these general terms:

> Often confused, bored and imprisoned, denied freedom of choice, freedom to roam without being counted, these Haitian refugees' hearts and spirits were broken.
>
> Without exception, the Haitians interviewed could not fathom what they had done to cause their incarceration. Those factors, and others which surfaced during the interviews, made it clear to the Master that there were elements of emotional trauma, fear, "pressure against the power of resistance," and subtle, indirect, as well as (in a few cases) direct, efforts to overpower the weak-willed, disheartened and disillusioned. See and compare, *Stein v. New York*, 346 U.S. 156, 185, 73 S.Ct. 1077, 1093, 97 L.Ed. 1522 (1953).

Master's Report and Recommendations at 9.

52. In this context the district court stated:

> . . . there is some evidence in the record that aliens of other nationalities, particularly Mexicans, when faced with the choice of staying in detention or voluntarily departing the country, choose the latter alternative.
>
> On the other hand, Haitians cannot voluntarily withdraw their applications for admis-

> Another reason [for the apparent disparate impact] is the State Department's position, be it right or wrong, that a prima facie case of asylum is not established solely by virtue of the fact that a Haitian national has left his homeland. Without the opportunity to present further evidence that there is a well-founded fear of persecution upon return to Haiti, the individual Plaintiffs herein cannot establish a prima facie case for asylum thereby entitling them to release on parole.

Louis III at 1000.

[55] This explanation also fails. First, no government witness established that citizenship in any relevant comparison group constitutes a prima facie case for asylum. Second, evidence differed on the effect of a prima facie case for asylum on detention and parole. *See* n. 9 *supra*. Finally, as we explore *infra*, the government took discriminatory steps to cut off the Haitians from one avenue by which they could claim asylum. If asylum is so important to release that a prima facie case for asylum makes the difference between freedom and incarceration the government should have made asylum procedures readily available to the Haitians.[53]

D. *The Final Analysis*

We are left, then, with a strong case of discrimination essentially unrebutted by the government. Plaintiffs introduced statistical information based on data provided by the government, data which showed that class members suffered a grossly disparate impact of the new policy. Plaintiffs also introduced a mass of testimony and documents relevant to various other *Arlington Heights* factors. In response the government relied on five witnesses.[54] One testified only to the access issue in remote detention facilities, *see infra;* another only to efforts of the Bureau of Prisons to locate detention space. The three remaining witnesses were Guiliani, Nelson and Howerton, whose testimony we discussed *supra*. All were admittedly removed from the actual process of parole, their testimony was inconsistent, and their self-serving affirmations of good faith fail to constitute rebuttal.

The facts bear review. The government introduced no evidence of what was actually occurring. No individual responsible for parole and detention decisions took the stand. The District Director testified he had delegated his authority to others, others who in turn testified in depositions to still further delegations. The evidence does not support any but the vaguest view of the new policy. Even if trial witnesses had established a uniform new policy, that new policy was never communicated to INS officials responsible for its implementation.

[56] The government's case therefore consisted of nothing but "mere protesta-

sion without court approval and, therefore, release of Haitians who desire to voluntarily depart is significantly delayed.
It is not clear from the district judge's opinion what required "court approval." We assume he referred to the immigration judge procedure, and address this claim in the body of the opinion. It is also possible he was referring to the injunction entered in *Louis I*, which prohibited the deportation of any class member, whether for voluntary departure or otherwise. This alternative interpretation likewise is invalid. First, it suffers the same defects as the argument concerning the injunction from holding exclusion hearings. Second, the injunction in *Louis I* specifically was modified to allow the voluntary departure of some Haitians. *Louis v. Meissner*, No. 81-1260-CIV-ALH Order of Nov. 26, 1981) (Kehoe, J.).

53. We are aware that a "prima facie" case for asylum differs from a grant of asylum based on the evidence. But, a grant of asylum *a fortiori* is stronger grounds for release than a "prima facie" case, which might be rebutted in the final analysis. The inequity of the government's program that eliminated Haitian claims to the district director, therefore, compels us to reject the government's argument that being Haitian does not qualify one for "prima facie" asylum.

54. In addition to these 5 "main" witnesses, other individuals testified to the numerical computations underlying the government's "statistics."

tion" and "arguments of counsel." These do not constitute rebuttal of a prima facie case of discrimination, especially one as strong as that proven by plaintiffs. *See Burdine, supra*, 450 U.S. at 255 n. 8, 101 S.Ct. at 1094 n. 8, 67 L.Ed.2d at 216 n. 8; *Castaneda, supra*, 430 U.S. at 499 n. 19, 97 S.Ct. at 1282 n. 19, 51 L.Ed.2d at 513 n. 19; *Alexander v. Louisiana*, 405 U.S. 625, 632–33, 92 S.Ct. 1221, 1226–27, 31 L.Ed.2d 536, 543 (1972). In fact, the government's case as presented reminds us of equally applicable language from *Castaneda*:

> We emphasize, however, that we are not saying that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case.

430 U.S. at 499, 97 S.Ct. at 1282, 51 L.Ed.2d at 513.

As the district court recognized, this is a classic case of unguided and unfettered discretion. *Louis III* at 981 n. 24. Cases are legion that discern the dangers of unguided discretion, preeminent among them the risk of selective and discriminatory enforcement. *E.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 170–71, 92 S.Ct. 839, 847–48, 31 L.Ed.2d 110, 120 (1972); *Yick Wo v. Hopkins*, 118 U.S. 356, 369–70, 373–74, 6 S.Ct. 1064, 1072–73, 30 L.Ed. 220 (1885); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C.Cir.1971). "Where, as here, there are no standards governing the exercise of discretion . . ., the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou*, 405 U.S. at 170–71, 92 S.Ct. at 847–48, 31 L.Ed.2d at 120. The obvious solution, frequently recommended to avoid the dangers of discriminatory enforcement, would have been a specific policy adopted pursuant to notice and comment rulemaking. *See Environmental Defense Fund, Inc. v. Ruckelshaus, supra*, 439 F.2d at 598 (courts should insist on rules and regulations that articulate the standards by which discretion is exercised) (cases cited). *See also Davis*, §§ 7.26, 9.7 (same).

[57] The district court concluded its opinion noting "[t]he appearance and allegations of discrimination in the case at bar could have been avoided by promulgation of the new detention rule pursuant to the APA." *Louis III* at 1001–02. We agree, though we find the discrimination real. The rulemaking requirements of the APA provide a minimum, not a maximum, to administrative procedure; they serve a crucial purpose in guiding administrative discretion. That is, and should be, the lesson of this case.

IV. Dismissed Claims: Asylum and Counsel

Prior to trial, on the basis of standing, exhaustion, and 8 U.S.C. § 1105a, the district court dismissed seven claims. Plaintiffs appeal the dismissal of two: whether individuals appearing for a preliminary inspection at the border are entitled to have counsel present and notice of that right and whether the INS must provide aliens with notice of the right to file for political asylum. *Louis II*, 532 F.Supp. 881, 885–92 (S.D.Fla.1982). Plaintiffs argue 8 U.S.C. § 1105a does not bar the claims, adequate injury was alleged to give them standing, and exhaustion was not necessary in the given case.

A. *8 U.S.C. § 1105a*

Construing the Immigration Act of 1917 in *Heikkila v. Barber*, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972 (1953), the Supreme Court held habeas corpus was the only means by which to challenge a final order of deportation. In a series of cases in the mid-1950's, however, the Court indicated the Immigration Act of 1952 mandates a different result. *Brownell v. Tom We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955). These cases held that in addition to habeas corpus, an action for declaratory or injunctive relief would lie to test the legality of deportation and exclusion orders.

[58] Largely in response to *Brownell v. Tom We Shung, supra*, Congress amended the 1952 Act to include § 1105a, which reads in pertinent part:

> (b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act *may obtain judicial review of such order by habeas corpus proceedings and not otherwise.*
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order ....

(emphasis supplied). Congress enacted § 1105a to cure what it perceived to be widespread abuse of judicial process by aliens against whom final orders of deportation or exclusion had been entered. *See, e.g., Brownell* (petitioner We Shung manages to delay deportation seven years while litigating issue of review). Section 1105a(b) makes clear that an alien in custody subject to exclusion has only one means of available review, an action for habeas corpus in the district court following exhaustion of all administrative remedies. Relying on § 1105a the district court dismissed the two claims raised on appeal.

[59] The government virtually concedes that the express language of § 1105a does not govern the claims advanced by the Haitians. "To be sure, 8 U.S.C. § 1105a by its terms deals with judicial review of ... 'a final order of exclusion,' whereas the plaintiffs have not yet undergone exclusion ... hearings." Appellees supp. cross-brief at 20. The government argues, however, that the intent of Congress in enacting § 1105a was to limit judicial review of exclusion proceedings to one proceeding—habeas corpus—rather than permit collateral attack before commencement of, or following, the immigration proceeding.[58]

Although the government's statement of Congressional intent is accurate, it is incomplete. Though Congress was concerned with unjustifiable delay, it was concerned with fair hearings as well. A close examination of the legislative material shows a balance of these competing interests.

Committee reports, and letters from administration officials included therein, evidenced displeasure with suits brought "solely for the purpose of preventing or delaying indefinitely [ ] deportation from this country," H.R.Rep. No. 1086, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Ad.News 2950, 2967, and complained of the "alien who has once had his day in court, with full rights of appeal to the higher courts, ... [and who is] permitted to block his removal and cause unnecessary expense to the government by further judicial appeals, the only purpose of which is delay," *id.* at 2968. Congress was interested in ensuring, however, that the alien receive a fair determination of his right to reenter or remain. *Id.* at 2967 (habeas will permit determination of whether hearing was fair, and exclusion on basis of grounds specified by Congress). It is an accurate statement of the legislative intent, we believe, that section 1105a provide "a fair, just, uniform and expeditious system of judicial review," *id.* at 2969 (letter of March 30, 1959 from Lawrence E. Walsh, Deputy Attorney General, to Hon. Emanuel Celler, Chairman, Committee on the Judiciary, House of Rep-

58. Because we presume judicial review of agency action unless review explicitly is precluded by statute, *Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192, 199 (1970); *Celanese Chemical Company, Inc. v. United States*, 632 F.2d 568, 575 n. 15 (5th Cir.1980), we question the propriety of restricting judicial review in this case, where the government concedes the statute does not govern. We need not decide this question, however, in light of our decision that the intent of Congress was not to restrict review in this case.

resentatives) (approving amendment to 1952 Act on behalf of administration). Our examination of plaintiffs' claims in light of the need for a fair, just, uniform and expeditious review convinces us that by passing 1105a Congress did not intend to close the courthouse doors to the issues dismissed by the court below.

Two factors in particular lead us to this conclusion. First, we do not here review the claims of one individual seeking relief from an order of exclusion. Rather, we are presented with the claims of over one thousand incarcerated aliens challenging similar procedural irregularities occurring prior to the commencement of exclusion hearings. Requiring each of these individuals to proceed to a final order only then to challenge the procedures on habeas would be neither uniform nor expeditious. Ignoring these issues would be to frustrate, not further, the intent of Congress. Given the opportunity to resolve at this juncture issues of widespread applicability, it would be error to decline jurisdiction on the basis of § 1105a.

[60] We reasoned similarly in *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), where the issue was whether the district court correctly retained jurisdiction over claims of the Haitian Refugee Center alleging procedural violations in the government's handling of asylum claims of deportable Haitians. Upholding jurisdiction in the district court we stated:

> Although a court of appeals may have sole jurisdiction to review alleged procedural irregularities in an individual deportation hearing *to the extent those irregularities may provide a basis for reversing an individual deportation order*, that is not to say that a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is not a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief. The distinction we draw is one between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged.

HRC v. Smith, 676 F.2d at 1033 (emphasis in original). The distinction enunciated in *Smith*, between an individual challenge to a deportation ruling and a wholesale program of constitutional violations, applies equally to exclusion proceedings.[84]

There is yet a significant second factor. In this case we have no confidence that the alleged violations ever will be remedied in subsequent administrative or habeas proceedings. In *Louis I* this concern also was expressed:

> In addition, the testimony has amply established that many of the refugees in the remote areas are unrepresented and are unlikely to be represented, either at their exclusion proceedings, at any possible appeal to the Board of Immigration Appeals, or to obtain judicial review of the issuance of a final order of exclusion by habeas corpus. Without such representation, a refugee receiving a final order, will thus be subject to immediate exclusion and deportation from this country.

530 F.Supp. at 928. Nor was such concern without firm foundation: eleven Haitians had already been deported pursuant to "faulty" procedures. *Id.* Not only was lack of representation a problem, but evidence taken at the preliminary injunction

84. Although the procedure due any individual alien in exclusion is not of constitutional magnitude, the character of the action changes when it challenges a widespread program calculated to deprive an entire class of statutory rights. Though the alien's due process right may only be to that process Congress determined was due, the class-wide deprivation of that process by the Executive is an equal protection violation.

hearings indicated that Creole translators often erred in translations, *id.* at 927, failed to give proper notice of the right to apply for asylum, *id.*, or to appeal the decision of the immigration judge. *Louis I*, 530 F.Supp. at 927. If an alien does not understand the right to appeal, and declines to do so, habeas review never will occur.

[61] We are persuaded by the legislative history of § 1105a that Congress, as eager as it was to eliminate delay and multiplicitous proceedings, genuinely intended that aliens receive a full and fair hearing. Although in exclusion the alien is entitled only to that process Congress provides as due, *Mezei; Knauff*, here Congress intended the ancient writ to be available, and used, to resolve procedural issues. Uncertain that the will of Congress can govern in the face of procedural confusion we provide the most sensible alternative available—review of allegations of wide-spread procedural violations before those violations cause irreparable harm.[57]

Agreeing to review similar claims in deportation hearings we cautioned in *HRC v. Smith* that:

> [w]e wish to emphasize the factual uniqueness of this case.... Congress resolved this problem by consolidating jurisdiction over challenges to final orders of deportation in one court, the court of appeals. We do not intend by our holding today to emasculate that solution, and given the narrowness of our holding, we do not expect such a result.

Id. at 1033. Our decision should not be viewed as a departure from the admonition in *HRC v. Smith*. Rather, it is yet another decision under facts paralleling, and related to, those in *HRC v. Smith*.

B. *Standing and Exhaustion*

[62, 63] In addition to § 1105a the district court relied on principles of standing and exhaustion to dismiss Counts II and VII. Standing is a mandatory jurisdictional consideration: Article III requires a plaintiff prove injury before federal courts may hear his cause. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Exhaustion on the other hand is discretionary in the district court: although as a general matter judicial economy and deference to administrative tribunals require a plaintiff to pursue all administrative remedies prior to requesting relief in court, circumstances may mitigate against exhaustion in a given case. *National Labor Relations Board v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 419, 426 n. 8, 88 S.Ct. 1717, 1723, n. 8, 20 L.Ed.2d 706 (1968); *HRC v. Smith, supra* at 1034; *Patsy v. Florida International University*, 634 F.2d 900, 904 (5th Cir.1981), *rev'd on other grounds*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

[64, 65] Exhaustion requires that plaintiffs pursue all available administrative remedies prior to asking a court for relief. *McKart v. United States, supra*, 395 U.S. 185, 193–95, 89 S.Ct. 1657, 1662–63, 23 L.Ed.2d 194 (1969). Exhaustion advances a number of valuable goals, including:

57. § 1105a is inapplicable altogether if the asserted claim is unrelated to exclusion hearings. *See Foti v. INS*, 375 U.S. 217, 229, 84 S.Ct. 306, 314, 11 L.Ed.2d 281, 290–92 (1963) (1105a encompasses all claims within final review of administrative process); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 215–17, 88 S.Ct. 1970, 1975–77, 20 L.Ed.2d 1037, 1044–45 (1968) (same). In *HRC v. Smith* we interpreted Supreme Court precedent to mean that § 1105a(a) [exclusive review in Court of Appeals] applied to "any attack *upon the proceedings* in which a deportation order was entered or upon any matter 'intimately and immediately associated' with the final order or '*governed by the regulations applicable to the deportation proceeding itself*, and ... ordinarily presented to the special inquiry officer who entered the deportation order' ...." *Id.* at 1032 (citation omitted). We believe similar analysis would apply to review of exclusion hearings as governed by § 1105a(b). Under this analysis plaintiffs' claim concerning notice of the asylum right may be eligible for separate review to the extent that a claim could be brought more favorably first before the district director, as some testimony indicates. Because we rely instead on a broader rationale, however, we need not determine those issues, if any, cognizable in an independent action brought by an individual.

> (1) allowing the agency to develop a more complete factual record; (2) permitting the exercise of agency discretion and expertise on issues requiring this; (3) preventing deliberate disregard and circumvention of established agency procedures; and (4) enhancing judicial efficiency and eliminating the need for judicial vindication of legal rights by giving the agency the first opportunity to correct any error.

HRC v. Smith, supra at 1034 (citations omitted). When, however, these policies are not served by requiring exhaustion, the district court may, in an exercise of its sound discretion, excuse the exhaustion requirement. *Industrial Union of Marine & Shipbuilding Workers, supra*, 391 U.S. 418, 419, 426 n. 8, 88 S.Ct. 1717, 1723 n. 8, 20 L.Ed.2d 706 (1968).

[66] The district court found plaintiffs failed to exhaust administrative remedies for the counsel and asylum claims, asserting the ills of the alleged violations could be cured at any point prior to entry of a final order of exclusion. *Louis II*, 532 F.Supp. at 888 & nn. 8–9. Addressing the counsel claim the court stated: "*[i]f* an alien has a *right* to be represented by counsel during an interview with an INS representative, and *if* a statement is taken from him in derogation of that right, which is used in subsequent proceedings and results in the entry of a final order of exclusion, that practice or procedure is reviewable on appeal to the BIA and in habeas proceedings." *Id.* Because class members most probably will be represented by counsel in subsequent exclusion hearings, *see, e.g.*, Stipulation Regarding Intervention of the Dade County Bar Association Haitian Refugee Volunteer Lawyer Task Force, and because the violation does "merge" into the final order of exclusion, we do not believe the district court abused its discretion in dismissing the counsel claim as unexhausted. Accordingly, we need not reach the question of standing on the counsel claim.

[67, 68] Standing and exhaustion as they apply to the asylum claim present a very different question. We disagree that the harm alleged in the asylum claim may be cured in subsequent proceedings. An alien uninformed of the right to request asylum is denied any opportunity to present an asylum claim before the district director. Testimony in the record indicates that requesting asylum before the district director is more favorable than asserting an asylum claim before an immigration judge in exclusion proceedings. Whether or not the chance of success is greater in the former proceeding, it is non-adversarial, which is not the case before the immigration judge, where an asylum claim is opposed by the INS. *See* 41 Tr. 824 (Anker testimony). Proceeding before the district director is undeniably one extra avenue to pursue in an attempt to remain in this country.

Consequently, the right to request asylum from the district director does not merge into a final order of exclusion. The proceeding before the district director is ancillary to, not a part of, the administrative proceedings reviewable before the BIA and on habeas. In *HRC v. Smith* we rejected a similar argument. *Id.* at 1035–36. There plaintiffs challenged the procedures used by the district director in addressing asylum claims, and we held exhaustion before the immigration judge unnecessary because administrative proceedings were an entirely different matter: the immigration judge simply has no authority over the district director. *A fortiori*, failing to notify plaintiffs here of their right to claim asylum deprived them altogether of an opportunity to appear before the district director. As we explained in *HRC v. Smith:*

> It is tautological that the exhaustion doctrine does not preclude the exercise of jurisdiction when there are no further administrative remedies to pursue.

Id. at 1035. *See also Porter v. Schweiker*, 692 F.2d 740 (11th Cir.1982).

[69] Our determination on grounds of exhaustion applies also to the question of standing. The district court held plaintiffs lacked injury-in-fact because the injury

only was "threatened," and could be cured in the exclusion proceeding. *Louis II, supra*, at 890–91. In part this is based on the district court's adherence to the notion that the process to which plaintiffs are entitled, *Mezei, Knauff*, is nothing more than an exclusion hearing. This is error. The Administration's own witnesses characterized the proceeding for asylum before the district director as a statutory and regulatory right. Statement of Alan C. Nelson before the House Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law (Oct. 28, 1981) at 5 (law permits two avenues of asylum; district director and immigration judge); *Meissner testimony* at 3–4 (same). As we noted, *supra*, denial of this course of action cannot be cured in exclusion proceedings. The immigration judge has no authority over, or to remand to, the district director. *HRC v. Smith*, 676 F.2d at 1085. Accordingly, if they are entitled to notice plaintiffs suffer injury when they are not informed of the availability of district director review. Whether they are so entitled we next address on the merits.

C. *The Merits*[58]

[70, 71] We previously have held that there is "at a minimum, a constitutionally protected right to petition our government for political asylum." *HRC v. Smith*, 676 F.2d at 1038. Because the basis for that right applies equally to excludable and deportable aliens, *id.*,[59] the right to petition for asylum applies to the cross-appellants before us. In *HRC v. Smith* the process by which asylum claims were evaluated was found faulty. *A fortiori*, failure to notify an alien of the right to claim asylum, thereby closing the door entirely on the process, must violate the right to present a petition for asylum.

The record shows that Haitians arrive in this country unschooled in our language and largely in ignorance of our legal system. *Cf. Louis I, supra*, at 926 (need for Creole translators). The record also indicates that "even in Miami, where INS Creole translators are presumably proficient, the translations at these [exclusion] proceedings are woefully inadequate." *Id.* at 927. Given this state of affairs we can hardly expect the Haitians arriving at our shores to be aware of, and prepared to exercise, their right to claim asylum.

[72] Congress, however, passed the Refugee Act of 1980, which confers the right to apply for political asylum, to give "statutory meaning to our national commitment to human rights and humanitarian concerns not reflected in the Immigration and Naturalization Act of 1952, as amended." S.Rep. No. 96–256, 96th Cong., 2nd Sess. 1, *reprinted in* 1980 U.S.Code Cong. & Ad.News 141. That commitment is meaningless without notification of the right. *Orantes-Hernandez v. Smith*, 541 F.Supp. 351 at 361 (C.D. Cal.1982); *cf. HRC v. Smith*. Accordingly,

58. The government, apparently convinced we would uphold the court below on the issue of jurisdiction, deemed it unnecessary to brief the merits of plaintiffs' claim. Although an adversary presentation serves to enhance our decisionmaking process, established precedent in this area convinces us that plaintiffs' claim has merit.

The government also urges we abstain from deciding this issue because it was not decided by the court below. *See Equal Employment Opportunity Commission v. Standard Forge and Axle Company, Inc.*, 496 F.2d 1392 (5th Cir.), *cert. denied*, 419 U.S. 1106, 95 S.Ct. 776, 42 L.Ed.2d 801 (1974). *Standard Forge* is premised upon cases such as *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941); those cases make clear the reason for abstention is to allow the lower court or administrative body to hear evidence. *Id.* at 556–57, 61 S.Ct. at 721, 85 L.Ed. at 1041. As the government stipulated to presenting this question as a pure question of law, however, letter from Thomas E. Moseley to Ira J. Kurzban (1/8/82), and as we agree, there is no bar to our proceeding on the merits.

59. The opinion of this court in *HRC v. Smith* relies upon regulations in 8 C.F.R. to support its determination of a constitutionally protected right to apply for asylum. Those same sections apply equally to excludable and deportable aliens. *Compare* 8 C.F.R. 108.1 (1978) *with* 8 C.F.R. 208.1; 208.2 (1982).

we hold for plaintiffs on the merits of this claim.

V. Access

Evidence at trial identified significant restrictions on Haitian access to legal counsel, restrictions on Haitian contact with relatives and friends in the Miami community, and efforts to prevent HRC attorneys from approaching Haitians to inform them of their legal rights. *See* Px 70; 72a-? (letters requesting access; generally denied); *Louis III* at 983, n. 27; Px 15 (Guidelines of Non-Media Visitors). Plaintiffs' complaint challenged these restrictions on numerous grounds, all but the first amendment claim were dismissed prior to trial. Plaintiffs do not challenge the dismissals. After trial the district court found the access claim moot because of the order to release the detained Haitians; the merits of the claim, therefore, never was addressed. Plaintiffs challenge the mootness holding and request a determination on the merits.

The issues raised in this ground of appeal are moot only if no class members are, or could in the future be, in detention or if the challenged INS conduct has ceased. Even under the order of the court below releasing the Haitians, however, INS retains discretion to revoke parole in appropriate cases. *See Louis v. Nelson*, 544 F.Supp. 1004, Final Judgment, n. 6. We proceed, therefore, to the merits.

The government urges us to abstain from deciding the access question on the merits because the issue was not decided by the court below and requires development of a factual record. *See Thomas v. J.C. Penney Co., Inc.*, 531 F.2d 270 (5th Cir.1976). HRC denies an insufficient record and argues that regardless of the record the INS access guidelines are facially invalid under the strict requirements of the first amendment. Plaintiffs, therefore, would have us award injunctive relief. *See e.g., Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir.1969).

[73] We agree with the government as to the impropriety of immediate relief. Although we find merit in the plaintiffs' association claims, this case does not involve an absolute denial of access, nor does it involve rules we can hold facially impermissible without knowledge of the countervailing circumstances. The government argues, and we agree, that regulation of aliens in detention is analogous to regulation in the prison context.[60] Accordingly, a determination of proper access regulations requires balancing the government's interest in detention and security against the plaintiffs' first amendment rights; preliminarily, a more developed factual record is essential.[61]

In the interest of judicial economy, however, we find merit in plaintiff's first amendment claims under the rationales of *NAACP v. State ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). In *Cruz v. Beto*, 603 F.2d 1178 (5th Cir.1979), we established that certain rights of mutual access exist between prisoners and counsel.

[74] More particularly we sustain plaintiff HRC's purely legal claim of a right to solicit clients in detention. Although this solicitation may not permit individual face-to-face encounter, if *Button* and *Primus*

60. The analogy serves its purpose insofar as concerns for security weigh in the balancing process. We limit our holding to this narrow point; there are obvious differences between temporary detention of innocent aliens and the incarceration of convicted felons.

61. The Guidelines of Non-Media Visitors, Px 15, appear overly restrictive. We nonetheless remand for a determination of whether these are the rules in force, how they are enforced, and how they compare with other access regulations for detention facilities. We reiterate that on the basis of the record before us we have insufficient information regarding the validity of these access restrictions.

mean anything they permit legal counsel to inform individuals of their legal rights when counsel does so as an exercise of political speech unaccompanied by expectation of remuneration. Ample evidence supports HRC's role as a politically active representative of the Haitian community. *See Louis III* at 984 n. 28. Evidence also shows that absent HRC's assistance many of the refugee class members would never have been informed of important statutory rights accorded them by Congress. Consequently we uphold the efforts of HRC in this regard.

[75] We emphasize, however, that first amendment rights in the prison context, sacrosanct as first amendment rights are, remain subject to reasonable restrictions necessitated by the requirements of security and management of the prison community. No cases cited by plaintiffs hold otherwise. Accordingly, we remand this issue for review of the government's access restrictions in light of the principles enunciated herein.

VI. Attorneys' Fees

While this case was before us plaintiffs presented a motion for attorneys' fees. We remand this issue as well, for decision in light of this opinion.

VII. Conclusion

In summation, we reiterate the Executive branch has full authority to protect and control our national borders. In the area of immigration Congress has empowered the Executive to adopt policies necessary to this objective. Therefore, though the change from the old policy to the new policy represented a distinct change in enforcement, from a policy of ready parole with limited exceptions to one of detention with limited exceptions, that policy determination was properly within the realm of Executive decisionmaking. Because those responsible for defining the scope of the policy failed to do so, leaving those who implemented it to apply a "binding norm" of widespread detention of Haitians, recourse to notice and comment rulemaking was required. Accordingly, we affirm the district court as to Count II of plaintiffs' complaint.

[76, 77] We find clearly erroneous, however, based on our careful and searching review of the record, the district court's conclusion that in the enforcement of the new policy there was no discrimination against plaintiff class. On the contrary, there was ample unrebutted evidence that plaintiffs were denied equal protection of the laws, as mandated both by the Constitution and our interpretation of Congress' enabling immigration legislation.[62] Although we hold that the Executive, through the INS, has the power when properly delegated to fashion such policies as are necessary to protect our borders and ensure orderly entrance of aliens, those policies must be administered in a non-discriminatory manner. Such a requirement is consistent with the basic principles upon which this country was founded. We therefore reverse the judgment of the district court as to Count VII.

Although we reverse the district court on the equal protection claim, the ultimate result remains the same: plaintiffs impermissibly have been denied parole. We remand to the court below for such relief as is necessary to remedy the discrimination and effectuate the rationale of this decision. Such relief shall include, but is not limited to: (1) an injunction against discriminatory enforcement of the new policy, (2) the continued parole of class members, (3) record-keeping requirements so the district court may ensure the policy is effectuated in the future in a non-discriminatory manner, (4) such relief as is necessary to resolve the asylum and access issues, and (5) whatever further relief is necessary to ensure that all aliens, regardless of their nationality or ori-

62. *See supra* at 1485 (Congress may draw distinctions between classes of aliens; Executive may not do so absent authorization from Congress).

gin, are accorded equal treatment.[63]

AFFIRMED in part, REVERSED in part, and REMANDED.

MEKDECI, David, an infant, By and Through Michael and Elizabeth MEKDECI, his natural guardians, and Michael and Elizabeth Mekdeci, Individually, Plaintiffs-Appellants, Cross-Appellees,

v.

MERRELL NATIONAL LABORATORIES, A DIVISION OF RICHARDSON-MERRELL, INC., a Delaware Corporation, Defendant-Appellee, Cross-Appellant.

No. 81-5625.

United States Court of Appeals, Eleventh Circuit.

Aug. 15, 1983.

Parents and child brought a products liability action against manufacturer of Bendectin, a nausea drug whose ingestion by the mother during her pregnancy allegedly caused child to be born with birth defects. The United States District Court for the Middle District of Florida, at Orlando, George C. Young, J., entered judgment on a jury verdict for defendant, and an appeal and cross appeal were taken. The Court of Appeals, Albert J. Henderson, Circuit Judge, held, inter alia, that: (1) following first trial, the district court did not abuse its discretion by ordering a new trial on all issues, instead of an adjudication solely for the purpose of assessing the amount of child's damages, since the unique circumstances disclosed of record provided abundant indicia that the jury compromised the issues of liability and damages, thus rendering them inseparable; (2) no compelling ethical considerations mandated withdrawal of plaintiffs' original attorneys from the case, regardless of plaintiffs' stated preference to keep their attorneys; the record did not contain evidence of a conflict in the attorney-client relationship of such proportions as to require an ethically mandated withdrawal of counsel, nor did the attorneys have an improper financial stake in the outcome of second trial which ethically precluded their continued representation; and (3) if plaintiffs were afforded inadequate representation, their remedy was not a new trial but a suit against their attorneys for alleged malpractice.

Affirmed on main appeal; dismissed on plaintiffs' appeal of award of costs; cross appeal dismissed as moot.

1. **Federal Civil Procedure** ⇐2313
Federal Courts ⇐825

District court's disposition of a motion for new trial is discretionary, and absent an abuse of that discretion, its decision will not be disturbed on appeal. Fed.Rules Civ. Proc.Rule 59(a), 28 U.S.C.A.

2. **Federal Civil Procedure** ⇐2344

An inadequate award of damages may constitute a sufficient reason to set aside a jury verdict. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

3. **Federal Civil Procedure** ⇐2344

While federal rule pertaining to the grant of a new trial permits a limited retrial on damages in the instance of an inadequate jury award, a partial new trial is appropriate only in certain circumstances. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

63. The relief of the district court ordering the release of class members was premised on an APA violation. We require the release to remedy discriminatory enforcement of the new policy. The terms of the relief ordered by the district court are not inconsistent with our holding here today and the court below should feel free to adhere to its original release program, supplementing it as necessary to ensure there is no repetition of the equal protection violation.

[12] Our review of the entire record convinces us that the omitted instruction did not so infect the entire trial that the resulting conviction violated due process. *Kibbe*, 431 U.S. at 154, 97 S.Ct. at 1736. The jury was told in the State's closing argument that it had to find from an examination of the evidence that Hunt "knew what she was selling," Rec., vol. II, at 233, that "she had guilty knowledge . . . [and] she knew what she was doing." *Id.* at 234. The following facts before the jury convince us there is no reasonable possibility the verdict would have differed if the scienter instruction had been given: (1) Hunt, through her daughter, produced "California Orgies" for Lynn Jones to examine; (2) the film was produced in response to a request for films with "good stuff in them"; (3) Hunt carefully questioned Jones as to whether Jones was the police officer in a photograph Hunt and her daughter were examining; (4) only after Jones assured them she was not pictured in their photograph was the film box "California Orgies" shown to her for purchase; (5) Hunt directly accepted payment for "California Orgies" and other materials; and (6) on the outside cover of "California Orgies" was a graphic picture which a jury could permissibly find obscene.

Moreover, Hunt has never claimed that the evidence at trial is insufficient to show her awareness of the contents of "California Orgies." Rather, her defense at trial was that the movie was not obscene by contemporary community standards. The three rejected jury instructions submitted by Hunt attempted to require a finding that she knew "California Orgies" was legally obscene; these instructions *did* not require the proper factual inquiry whether she was aware of the general contents of the film. On appeal, Hunt's position is that the absence of a scienter instruction requires reversal regardless of her knowledge of the film's contents. Brief for Appellee at 12–13. This is incorrect in light of the *Kibbe* decision.

The facts in evidence, coupled with Hunt's failure to raise both at trial and on appeal the insufficiency of the evidence on the issue of her knowledge of the contents of the film, lead us to conclude that the omitted instruction did not so prejudice Dorothy Hunt that her due process rights were violated. *See United States v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1595, 71 L.Ed.2d 816 (1982).

The judgment of the court below is reversed. The case is remanded with directions that the writ be discharged.



Marie Lucie JEAN, et al., Plaintiffs,

Lucien Louis, et al., Plaintiffs-Appellees,

Miami Daily News, et al.,
Intervenors-Appellants,

v.

Alan C. NELSON, et al., Defendants-Appellants, Cross-Appellees.

No. 82-5772.

United States Court of Appeals,
Eleventh Circuit.

July 13, 1982.

On appeal from judgment of the United States District Court for the Southern District of Florida, Eugene P. Spellman, *J.*, the government moved for partial stay. The Court of Appeals held that the government failed to show existence of the requisite circumstances.

Motion denied.

Federal Courts ⇐684

To justify Court of Appeals' staying judgment of district court pending appeal the government, as movant, was required to show likelihood of ultimate success on appeal, irreparable injury to it, that granting a partial stay would not substantially harm plaintiffs and that the public interest would be served.

Rudolph W. Giuliani, Assoc. Atty. Gen., U. S. Dept. of Justice, Washington, D. C., for defendants-appellants, cross-appellees.

Kurzban & Kurzban, P. A., Ira J. Kurzban, Michael J. Rosen, Miami, Fla., Bruce Winick, American Civil Liberties Union Foundation of Florida, Inc., Coral Gables, Fla., for plaintiffs-appellees.

John Kendrick Tucker, Deputy Atty. Gen., Tallahassee, Fla., for intervenor-appellant State.

Appeal from the United States District Court for the Southern District of Florida.

On Motion for Partial Stay

Before GODBOLD, Chief Judge, and HATCHETT and CLARK, Circuit Judges.

BY THE COURT:

The United States has moved for a partial stay of the judgment of the United States District Court for the Southern District of Florida entered June 29, 1982. Hearing and briefing have been expedited, and the Court has heard oral argument and has considered the briefs.

To justify granting the partial stay the United States would be required to show that the following circumstances exist: (1) likelihood of ultimate success on appeal; (2) irreparable injury to the government; (3) granting the stay will not substantially harm plaintiffs; and (4) the public interest will be served by the partial stay.

The government has not been able to show that any one or more of these circumstances exist.

The motion for partial stay is DENIED.

The case is expedited for hearing on an early oral argument calendar.



N. H. NEWMAN, et al.,
Plaintiffs-Appellees,

United States of America, et al.,
Amicus Curiae,

v.

STATE OF ALABAMA, et al.,
Defendants-Appellees,

Charles A. Graddick, Attorney General, State of Alabama, Movant-Appellant.

N. H. NEWMAN, et al.,
Plaintiffs-Appellees,

United States of America, et al.,
Amicus Curiae,

v.

STATE OF ALABAMA, et al.,
Defendants-Appellants.

Nos. 81-7606, 81-8003.

United States Court of Appeals,
Eleventh Circuit.

Aug. 9, 1982.

State prison officials and others appealed from an order of the United States District Court for the Middle District of Ala-

Flynt's motion for partial summary judgment is denied. Plaintiff's cross-motion for partial summary judgment is granted as to the issue of Flynt's liability on her claims for violation of her rights of privacy and publicity.

In addition, plaintiff's motion to consolidate *Lerman v. Flynt Distributing Co.*, No. 81 Civ. 2281 with *Lerman v. Chuckleberry Publishing, Inc.*, No. 80 Civ. 1658 is granted. Plaintiff's motion to amend her complaint in *Lerman v. Chuckleberry Publishing, Inc.*, No. 80 Civ. 1658 also is granted.

SO ORDERED.



Lucien LOUIS, Wilner Luberisse, Jean Louis Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard, Joel Casimir, Job Dessin and Prophete Talleyvand, on behalf of themselves and all others similarly situated; and the Haitian Refugee Center, Inc., a non-profit membership corporation, on behalf of itself and its members, Plaintiffs,

v.

Alan NELSON, Commissioner, Immigration and Naturalization Service, Joe Howerton, District Director, Immigration and Naturalization Service, District VI; Lee Rowland, Assistant District Director of Deportation, Immigration and Naturalization Service, District VI; Cecilio Ruiz, Officer in Charge, Krome Avenue North Detention Facility; Immigration and Naturalization Service; and William French Smith, Attorney General of the United States, Defendants.

No. 81-1260-CIV-EPS.

United States District Court,
S. D. Florida.

June 18, 1982.

Haitian nationals brought suit challenging a Immigration and Naturalization Service policy whereby excludable aliens were placed in detention and were denied parole until they established a prima facie claim for admission. The District Court, Spellman, J., held that: (1) plaintiffs were not required to exhaust administrative remedies; (2) the case was not nonjusticiable under the political question doctrine; (3) the plaintiffs had standing; (4) the district court had jurisdiction; (5) the failure to promulgate the policy in accordance with the notice and comment procedures of the Administrative Procedure Act rendered the policy void and unenforceable; and (6) the policy was not discriminatorily applied against Haitians.

Judgment for plaintiffs.

See also, D.C., 532 F.Supp. 881 and D.C., 544 F.Supp. 1004.

1. Administrative Law and Procedure ⇐229

Party will normally be denied judicial relief until administrative remedies available to him have been exhausted and, by refusing to interrupt administrative process, several policies are advanced: more complete record is developed; agency is allowed to exercise its discretion or expertise; agency is allowed to correct its own errors; and agency is not weakened by easy circumvention of its procedures.

2. Administrative Law and Procedure ⇐229

Exhaustion doctrine should not be rigidly applied, but it is flexible concept that must be tailored to administrative statutes and circumstances peculiar to case and thus, failure of one or more plaintiffs to exhaust his administrative remedies does not automatically preclude court from hearing their claims, but that decision must be based on balancing test that employs policy factors favoring exhaustion and circumstances peculiar to case that favor judicial review.

3. Aliens ⇐54.3

Haitian nationals were not required to exhaust administrative remedies before

seeking to enjoin new policy whereby excludable aliens were placed in detention until they established a prima facie claim for admission, since administrative remedy available was coextensive with Haitians' claim, in that form and application of remedy was under attack of statutory and constitutional grounds, and further attempts for administrative relief would be futile.

4. Constitutional Law ⇐68(1)

Political question doctrine did not bar district court from considering validity of Immigration and Naturalization Service policy placing excludable aliens in detention until they established prima facie claim for admission.

5. Federal Civil Procedure ⇐103

Injury-in-fact element of standing test requires plaintiffs to demonstrate sufficiently direct and concrete injury, which is likely to be redressed if plaintiffs prevail on merits.

6. Federal Civil Procedure ⇐103

Haitian nationals denied parole unless they established prima facie claim for admission, had standing to challenge Immigration and Naturalization Service policy placing such excludable aliens in detention.

7. Administrative Law and Procedure ⇐324

Fact that statute by its terms permits rather than compels agency action does not alone commit that action to agency's unreviewable discretion. 5 U.S.C.A. § 702.

8. Aliens ⇐53.9, 54.3(1)

Decision to parole excludable alien was not committed to exclusive jurisdiction of Immigration and Naturalization Service and new INS policy whereby excludable aliens were placed in detention until they established prima facie claim for admission was subject to judicial review. 5 U.S.C.A. § 702.

9. Aliens ⇐39

Nonresident aliens have no right to enter United States as nonimmigrants or otherwise.

10. Aliens ⇐54.3(1)
Declaratory Judgment ⇐203
Federal Courts ⇐192

District court had jurisdiction under Declaratory Judgment Act, Administrative Procedure Act, and general federal question statute to review validity of Immigration and Naturalization Service policy whereby excludable aliens were placed in detention until they established prima facie claim for admission. Immigration and Nationality Act, §§ 106, 279 as amended 8 U.S.C.A. §§ 1105a, 1329; 28 U.S.C.A. §§ 1331, 2201, 2202, 2241; 5 U.S.C.A. § 702.

11. Aliens ⇐53.9

Immigration and Naturalization Service policy whereby excludable aliens were placed in detention until they established prima facie claim for admission was substantive rule and was invalid where it was promulgated without notice and comment procedures required by Administrative Procedure Act. 5 U.S.C.A. § 553.

12. Administrative Law and Procedure ⇐394, 400

Substantive rule, subject to notice and comment procedures, as opposed to interpretative rule which is exempt, is rule made by agency pursuant to its delegated power to make rules having force of law if they are constitutional, within granted power, and issued according to proper procedure. 5 U.S.C.A. § 553.

13. Constitutional Law ⇐274.3

Congress has plenary power to decide which aliens shall be allowed to enter and what procedure shall be used to determine their admissibility, and whatever procedure authorized by Congress is, it is due process as far as alien denied entry is concerned. U.S.C.A.Const.Amend. 5.

14. Constitutional Law ⇐274.3

When requesting release on parole, nonresident aliens are entitled to same constitutional protections afforded all persons within territorial jurisdiction of the United States and they may not be deprived of their liberty without due process and cannot be denied parole solely because of their race

and/or national origin. 5 U.S.C.A. §§ 552(a), (a)(1)(D), 553; U.S.C.A.Const. Amend. 5.

15. Constitutional Law ⇐274.3

Congress can legitimately make distinctions among and against aliens that would be unacceptable if applied to citizens, but in enforcement of those policies, government must respect procedural safeguards of due process. U.S.C.A.Const.Amend. 5.

16. Constitutional Law ⇐253.2(2)

While Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process and equal protection analysis in the Fifth Amendment area is the same as that under Fourteenth Amendment. U.S.C.A.Const.Amends. 5, 14.

17. Constitutional Law ⇐211(1)

Type and level of proof required to establish prima facie case of discrimination on basis of national origin is essentially the same as that required in cases of racial discrimination. U.S.C.A.Const.Amends. 5, 14.

18. Constitutional Law ⇐211(1)

In order to establish claim of discrimination under equal protection clause, plaintiff must show that defendant intentionally or purposefully discriminated against him; however, plaintiff need not prove that discriminatory purpose was sole, dominant, or even primary purpose in challenged action, but only must show that it was motivating factor in decision. U.S.C.A.Const.Amends. 5, 14.

19. Constitutional Law ⇐211(1)

Factors which courts may consider in determining existence of discriminatory purpose are foreseeability of discriminatory impact, knowledge of discriminatory impact, absence of any valid interests being served, and availability of less discriminatory alternatives. U.S.C.A.Const.Amends. 5, 14.

20. Constitutional Law ⇐250.5

Immigration and Naturalization Service policy whereby excludable aliens were placed in detention until they established prima facie claim for admission was not discriminatorily applied against Haitians in violation of equal protection. U.S.C.A. Const.Amend. 5.

21. Aliens ⇐54(1)

Policy reasons for rule-making procedure apply with equal force in field of immigration, and it matters not that those regulated are outside country and cannot reasonably be expected to receive notice and to participate in rule-making proceedings. 5 U.S.C.A. § 553.

Ira J. Kurzban, Kurzban, Kurzban & Weinger, Miami, Fla., Bruce Winick, Univ. of Miami School of Law, Coral Gables, Fla., Irwin P. Stotzky, Vera Weisz, Miami, Fla., Michael J. Rosen, Miami, Fla.; Robert E. Juceam, Irwin Blum, Terrence A. Corrigan, Anne Golden, Mary R. Gilmore, Robin A. Fleischner, Jeffrey Susskind, New York City, for plaintiffs.

Robert Bombaugh, Dept. of Justice, Civ. Div., Washington, D. C., Thomas E. Moseley, Sp. Asst. U. S. Atty., Miami, Fla., for defendants.

Jim Peters, Dept. of Legal Affairs, Tallahassee, Fla., for State of Fla., intervening defendant.

MEMORANDUM OPINION [1]

SPELLMAN, District Judge.

"Life is like an onion;
you peel off one layer at a time,
and sometimes you weep."
Carl Sandburg

This case has been described by the Government as nothing more than an attack on the proper constitutional effort of the United States to protect its borders from invasion. It has been described by the Plaintiffs as the worse possible case of the Government of the United States engaging in invidious discrimination.

1. This cause was tried before the Court sitting without a jury. The following Memorandum Opinion shall constitute the Court's Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52.

The detention policy giving rise to this lawsuit has been described by some in the news media as a moral disgrace and by others as simply President Reagan's answer to Carter's timidity.

The policy attempted to be formulated and implemented has been both praised and criticized before Congress.

The religious leaders have assailed this matter as a moral issue; the Attorney General of the United States as a political decision.

The letters received by this Court from the outset of receipt of this case in December of 1981 make it clear that to whomever this matter is addressed it is received neither dispassionately, objectively or without some bias having been formed well in advance.

This opinion, the Court fears, will lack the understanding necessary to convey the complexity of the issues formed and the absolute necessity that in recognizing the right of the executive to exercise certain inherent powers, we must never lose sight of the rule of law. It is hoped that in the passioned subjectivity and prejudice of those that read this opinion those that assert detention to be morally wrong must realize that the executive branch of Government must sometimes adopt drastic policies to achieve purposes otherwise unattainable; and to those who would assert the omnipotent power of government to recognize that in adopting such policies they are never above the rule of law, however well intended their actions.

The primary question raised by this action is whether an excludable alien can be incarcerated during the pendency and possible appeal of his claim for admission to this country. This case in a nutshell involves the individual right of freedom versus the right of the United States to enforce the immigration laws of this country.

The sovereign United States government has an absolute right to control its borders. "The right to do so stems not only from legislative power, but is inherent in the executive power to control the foreign affairs of the nation. *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255; *Fong Yue Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 1022, 37 L.Ed. 905. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power." *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950).

Congress has passed extensive legislation governing the admission of aliens into this country. The legislation provides the executive with a [relatively] clear indication of Congress' view of immigration policy and a way to carry out their intent.

> The basic premise of the immigration law is that no alien may enter the United States unless his entry is authorized by statute. An alien thus cannot lawfully come across the border of this country unless the law sanctions his entry. Conversely, an alien who complies with the legislative directives has a right to enter if he presents himself at a port of entry.

1 C. Gordon & H. Rosenfeld, Immigration Law and Procedure § 2.1b (footnotes omitted).

The chief and almost exclusive concern of the immigration laws is with aliens who seek to enter the United States from abroad. Congress has imposed three types of restrictions on such aliens: qualitative restrictions bar certain classes of undesirable aliens, principally on health, moral, criminal, political or economic grounds. Numerical limits govern those aliens who come to stay permanently. Documentary restrictions establish identity and assure compliance with other prescribed requirements by commanding entering aliens to obtain and present certain documents, usually in the form of passports or equivalent papers.[2]

Congress has charged the executive branch with the duty to enforce the immigration laws. The Immigration and Naturalization Service (hereinafter INS), a component of the Department of Justice, is the agency that carries out the enforcement

2. *See generally* 2 C. Gordon and H. Rosenfeld, Immigration Law and Procedure § 2.1b.

function of the executive branch in matters relating to immigration.[3] INS has found the most efficient way to carry out this mandate is by requiring all aliens seeking admission to present themselves to immigration for inspection at designated ports of entry.[4] Upon arriving at immigration, the aliens must establish their admissibility to the satisfaction of the immigration officer in charge.[5] Admissibility is easily established if the alien has in his possession all of the documents necessary to enter provided these documents are in good order and not suspect.[6]

Many aliens choose not to follow the prescribed procedures for entering the United States. Some seek to enter surreptitiously at night, by crossing the border in remote, inaccessible areas; others through fraud. Within this class of aliens, motives vary from a simple desire to seek a better life to some individuals who truly seek to escape persecution and repression in their homeland.

If an alien successfully crosses the border surreptitiously, the chances of being apprehended at a later time are slim. INS does not have the resources to make large scale searches for illegal entrants, to proceed against them and possibly expel them. It is much more efficient to use border patrol personnel to apprehend and deter aliens seeking to enter the country unlawfully. INS' efforts in this regard are of marginal effectiveness because this nation's borders are too expansive to be effectively patroled without continuous use of hundreds of thousands of guards.

All of INS' efforts are designed to ferret out aliens who for one reason or another are inadmissible, thereby keeping the number and character of immigrants entering the United States in line with congressional policy. Inadmissible aliens are either deportable or excludable; the former being persons who have effected an "entry", the latter being persons deemed not to have entered the United States.[7] The irony of this distinction is that deportable aliens, many of whom entered the country surreptitiously, are given more rights under the law than excludable aliens who present themselves to immigration.[8] The practical effect of this is to encourage those who attempt to sneak across the border because they are rewarded with greater rights than those aliens who attempt to comply with our laws.

Regardless of whether an alien is excludable or deportable, if the alien claims to be admissible INS must determine the merits of the claim.[9] In the case of excludable aliens, Congress has enacted legislation giv-

3. 8 U.S.C. § 1103.

4. 8 U.S.C. § 1225; 8 C.F.R. §§ 100.4, 235.1.

5. 8 U.S.C. § 1225.

6. 8 C.F.R. § 235.1.

7. 8 U.S.C. § 1101(a)(13) defines the term "entry" to mean "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise . . ." *See generally Barber v. Gonzales*, 347 U.S. 637, 641, 74 S.Ct. 822, 824, 98 L.Ed. 1009 (1954) and cases cited therein. *See also* 8 U.S.C. §§ 1226, 1251, 1252.

8. 8 U.S.C. §§ 1226, 1252. *See The Chinese Exclusion Cases*, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893); *Lem Moon Sing v. United States*, 158 U.S. 538, 15 S.Ct. 967, 39 L.Ed. 1082 (1895); *United States v. Ju Toy*, 198 U.S. 253, 263, 25 S.Ct. 644, 646, 49 L.Ed. 1040 (1905) (The requirements of a judicial trial do not prevail in every case. The decision to deny entrance to an alien may be entrusted to an executive officer and his decision is due process); *accord Knauff v. Shaughnessy*, 338 U.S. 537, 544, 70 S.Ct. 309, 313, 94 L.Ed. 317 (1950) (whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned.) *But see Ng Fung Ho v. White*, 259 U.S. 276, 282, 42 S.Ct. 492, 494, 66 L.Ed. 938 (1922); *Chlomos v. INS*, 516 F.2d 310 (3rd Cir. 1975); *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977); *Garcia-Jaramillo v. INS*, 604 F.2d 1236 (9th Cir. 1979) (In a deportation hearing an alien is entitled to the guarantee of due process which is satisfied only by a full and fair hearing); *Garica v. Smith*, 674 F.2d 838, 841 n.3 (11th Cir. 1982) citing *Leng May Ma v. Barber* 357 U.S. 185, 187–188, 78 S.Ct. 1072, 1073–74, 2 L.Ed.2d 1246 (1958).

9. 8 U.S.C. §§ 1226, 1252.

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ing them a right to an exclusion hearing.[10] An exclusion hearing is a quasi-judicial proceeding that is held before an immigration judge. While the hearing is not subject to all of the protections of due process, it must be fair and in accordance with the statutes and regulations.[11] If the alien loses at the exclusion hearing, the statute provides that he may seek review of that decision in the Board of Immigration Appeals (BIA).[12] If this appeal is unsuccessful and a final order of exclusion is entered against the alien, that order may be reviewed by filing a petition for a writ of habeas corpus in the federal district court.[13] The district court's decision can be appealed to the United States Circuit Court of Appeals and ultimately the alien may seek review by certiorari in the United States Supreme Court.[14]

The practical effect of trial and appellate rights for excludable aliens is that if he is apprehended, an alien determined to stay here who retains a skilled immigration lawyer may prolong his departure from this country for years.[15]

A. BACKGROUND

The ineffectiveness of our immigration system is vividly reflected by the present conditions in South Florida. The migration of undocumented Haitians to South Florida began in December 1972. By the beginning of 1981, an estimated thirty-five thousand undocumented Haitians were already present in this region. Yet, throughout this time, INS has failed to develop a comprehensive policy to deal with the situation.

During this period of time, INS entered into an agreement with the National Council of Churches providing that Haitians who arrived in South Florida by boat other than a certified carrier were to be detained only a brief period of time for medical screening and were routinely released to available sponsors and given work authorizations.[16] The release of Haitians lasted until the Spring of 1981.[17]

In early April 1980 some 10,000 Cubans sought sanctuary in the Peruvian Embassy in Havana, Cuba. Within a few days thereafter, boats began to leave South Florida for Cuba's Mariel Harbor, in order to bring Cubans to the United States. Thus began the Mariel Boatlift or Freedom Flotilla during which some 125,000 Cubans were brought to the United States in the Spring of 1980.

The boatlift, and the Government's inability to control it, were natural and foreseeable consequences of this country's lack of a comprehensive immigration policy. Once the "Freedom Flotilla" started, noth-

10. 8 U.S.C. § 1226.

11. *Garcia v. Smith*, 674 F.2d 838, 841 n.3 (11th Cir. 1982).

12. 8 U.S.C. § 1226(b) provides in part "From a decision of a special inquiry officer an alien may take a timely appeal to the Attorney General and any such alien shall be advised of his right to take such an appeal." The Attorney General has delegated his authority to hear appeals from decisions of special inquiry officers to the BIA. *See* 8 C.F.R. § 3.1(b)(1).

13. 8 U.S.C. § 1105a(b).

14. The lengthy administrative and judicial proceedings involved in resolving an alien's claim for admission raises serious questions regarding the validity of detaining aliens, pending resolution of their claims, without some sort of a due process hearing. The argument in favor of a hearing is particularly compelling when the essence of the alien's claim for admission is based on a fear of persecution upon return to his homeland. Thus, the "choice" to voluntarily withdraw an application for admission and thereby be released from detention may not be a meaningful choice. Indeed, the Plaintiffs' failure to elect this alternative indicates that detention in the United States is the lesser of two evils.

15. *See* 8 U.S.C. § 1255 regarding discretionary relief from deportation.

16. Joint Pretrial Stipulation, docket no. 336, filed March 2, 1982, Par. 5(1)-(4).

17. The number of Haitians apprehended during this period indicates a trend of increased migration to the shores of South Florida. The logical inference to be drawn from this data is that the policy of parole in conjunction with work authorization "provided the greatest inducement to the ultimate swollen tide of incoming undocumented Haitians." *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 at 1029 n.11 (11th Cir. 1982).

ing could be done except to allow the Cubans to arrive and then formulate, on a post hoc basis, a plan to process and resettle them. When the plan was developed, it also took into account the Haitians who had entered the United States during this period. The Carter Administration established a "Cuban/Haitian" entrant status for all Cubans who arrived in the United States between April 21 and June 20, 1980, and for all Haitians who arrived prior to June 20.

The Carter Administration's plan did no more than assign an immigration status to these aliens and assist in the efforts to resettle them. The local communities were left with the task of providing jobs, housing, health care and food for the approximately 150,000 new residents of South Florida. This burden taxed local resources to their limits and continues to do so.

B. POLICY CHANGE

In February 1981, the Select Committee on Immigration that was appointed by the Carter Administration issued a report that concluded what this community was already painfully aware of: an immigration crisis exists in this country. As a result, President Reagan, in March 1981, convened a special task force to consider the continuing problem of illegal immigration into the United States. The Attorney General presided over the task force which consisted of the cabinet officers in charge of the Departments of State, Defense, Transportation, Labor, Commerce, Health and Human Services and the Director of the Office of Management and Budget.

The task force recognized the tremendous problems created by illegal immigration, particularly at a time of inflation and unemployment, and noted that the public "[c]oncern has been heightened by the mass influx of Cubans and Haitians into South Florida and the continuing arrivals of refugees from other parts of the globe." Materials were submitted to the task force demonstrating that there were anywhere between three to six million people, possibly more, here illegally and that we had developed an underground society in America. Because these people constantly lived in fear of being deported, they were particularly vulnerable to unfair labor practices, as well as other forms of economic intimidation. In addition, the task force found that illegal aliens became associated with criminal acts and even when they were not participants, they would not come forward as either victims or witnesses of crimes.

The task force attempted to develop comprehensive solutions to deal with these and other problems resulting from continuing illegal immigration and the presence in American society of large numbers of illegal aliens. The policy proposals that came out of the task force can best be described by dividing them into two categories. The first proposal was designed to deal with those illegal aliens already present in the United States. Rather than waste the resources that would be necessary to apprehend, bring deportation proceedings and possibly expel these people, the task force recommended to the President that there be an amnesty program to legalize the status of the illegal alien population. Having made this decision, a second group of proposals dealing with aliens unlawfully coming to the United States was necessary.

The task force was concerned that an amnesty program, particularly on so large a scale, would encourage even more illegal immigration by persons seeking to obtain the benefits thereof. Accordingly, the task force also recommended increased efforts to enforce the immigration laws as written and proposed new legislation designed to correct problem areas in the existing legislation. One of the major new policies that was recommended and adopted were sanctions against employers who employ illegal aliens. This was designed to remove one of the motivations to come here illegally. Another proposal was to amend the criminal laws so that it clearly became a crime to bring aliens illegally into the country regardless of whether it is done surreptitiously or openly as it was done during the Mariel Boatlift. Such a statute would hopefully deter another Mariel. It was also recommended that there be a return to a

policy of detaining aliens until they can establish to INS' satisfaction a prima facie claim for admission to this country.[18]

The President approved the recommendations of the Task Force with respect to an amnesty proposal and increased enforcement efforts, including detention.[19] In addition, he approved a limited proposal to interdict the flow of illegal immigration from the Caribbean.

Thereafter, on July 30, 1981, the President issued a statement on the immigration policy of this nation. That statement noted that "[i]mmigration and refugee policy is an important part of our past and fundamental to our national interest." Moreover, the statement emphasized the need to "establish control over immigration" and pointed out that the Attorney General was taking administrative actions as well as submitting proposed legislation designed to guarantee that foreigners were admitted to the United States "in a controlled and orderly fashion . . ."[20]

That same day the Attorney General appeared before a joint session of the Senate Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration, Refugees and International Law. The Attorney General advised Congress that "we have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." In that connection, the Attorney General noted that the Government's attempt to screen and process those seeking entry into the United States has simply "crumbled under the burden of overwhelming numbers." As part of the overall plan to regain control over the borders, the Attorney General emphasized the "necessity of detaining illegal aliens pending exclusion."[21]

Part of the new immigration program approved by the President called for more restrictive use of parole and increased use of detention. However, the Task Force's proposal in this area, and the statute on which they relied, did not indicate to those who had to administer the new policy which excludable aliens were to be detained. Justice Department and INS personnel were given the responsibility to develop the specific aspects of this plan.

18. Detention is not a new concept in the field of immigration law. During the late 1940's and early 1950's it was a routine practice. However, in 1954, when the Ellis Island detention facility was closed, the policy was established that aliens seeking admission into the United States should not be placed in physical incarceration unless they were a security risk or likely to abscond. This policy was never formally promulgated.
Under the policy adopted in 1954, at least 95% of aliens whose admissibility was questioned were not subject to detention. Since then, hundreds of thousands of aliens have been released including a large number of aliens whose admissibility was questioned. Aliens making political asylum claims were generally granted deferred inspection, a form of parole, while their claims were processed. These aliens need not have documents. *See Pierre v. United States*, 547 F.2d 1281, 1283 (5th Cir. 1977), *vacated and remanded*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977). The parole practice never distinguished between persons who were documented or undocumented or whose documentation was challenged.

19. On June 26, 1981, the Attorney General sent a memorandum with attached decision packets to the President of the United States. One of the packets was designated as the "Cuban/Haitian Problem". Under that heading in the attached paper, Option 1 ["Status Quo"] was not recommended by any of the advisors, Option 2 ["Limited Interdiction plus Status Quo Non-detention"] was recommended only by the Department of Transportation and Frank Hodsol, and Option 3, ["Interdiction and Detention"] was recommended by the Department of State, Justice, Treasury, Labor and HHS. This option, which ultimately was the policy announced by the Reagan Administration was analyzed as follows:
"Detention could deter continuing illegal immigration reducing adverse community impact . . . But detention risks camp overflowing because of procedural delays . . . Detention could create an appearance of 'concentration camps' filled largely by blacks."
Plaintiffs' Exhibit 4 at page 8.
Thus, it is apparent that detention was approved in spite of the potentially adverse effects of the appearance of discrimination. The evidence in this regard does not support Plaintiffs' position that the Administration acted with a discriminatory purpose or motive.

20. Plaintiffs' Exhibit 31

21. *Id.*

The people in charge of drafting the detention guidelines were cognizant of the fact that the new policy was not applicable to all excludable aliens. INS never intended to physically incarcerate persons who complied with the prescribed procedures for admission but were excludable on minor, technical grounds such as a clerical error on their visa. The policy was designed to deal with another Mariel type situation, regardless of the nationality or number of the arriving aliens. Therefore, the guidelines for detention had to reflect the perceived characteristics such a group of aliens would have. The problem was isolating these characteristics and incorporating them into guidelines that were capable of being objectively applied in individual cases.

The President did not specify whether the development of specific detention and parole criteria was to be accomplished internally by INS or through a rulemaking procedure in which the public could participate. *INS elected to do neither.* They admitted to the Court that they made a conscious decision not to promulgate a rule pursuant to the Administrative Procedure Act. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission.

Defendants can point to no operating instruction, internal memorandum or other document that completely reflects the official detention policy. Consequently, the Court cannot precisely define the criteria for detention any better than the Government's witnesses articulated them.[22] However, the general theme that emerges from the evidence is that aliens are to be detained unless and until they establish to INS' satisfaction a prima facie claim for admission.[23] Within this framework, the District Director had no discretion to grant deferred inspection to Haitians arriving aboard non-signatory carriers without first placing them in detention.

C. THE CLASS—THE EVIDENCE

The evidence shows that prior to May 20, 1981, Haitian refugees arriving in this country, for whom the INS initiated exclusion proceedings, were detained for a brief period of time necessary for routine public health screening and released on parole into the community to relatives or voluntary agencies willing to act as sponsors. This "policy" abruptly changed sometime between May 20, 1981 and July 31, 1981; and a policy of detention was initiated.

Notwithstanding the fact that there are no clear guidelines for who should be detained and who should be paroled, INS has continued to enforce the new policy.[24] As

22. Plaintiffs' Exhibit 71C (Declaration of Alan Nelson); Transcript at 2180, 2269–70; deposition of Doris Meissner, Sept. 1, 1981, at p. 5–8. No two explanations were alike.

23. In referring to "criteria for detention" the Court means those factors that would be considered by the immigration inspector in determining whether an excludable alien should be given a deferred inspection or placed in detention. Parole criteria are factors to be considered in determining whether an alien in detention should be released.

24. The Court believes that the inconsistencies between what the Government witnesses said the policy was and the policy their subordinates were carrying out can be attributed to the absence of guidelines for detention and parole. For example, the evidence shows that the failure to define who is a minor and what efforts should be made to reunify families sometimes had cruel results.

MR. ROSEN:
Q Joel, would you state your name, please.
A Joel Girardin.
Q Joel, how old are you?
A Fifteen.
Q When did you first arrive in this country?
A On October 12th, 1981.
Q And were you arrested immediately upon entering this country?
A Yes.
Q Where were you taken, Joel?
A To Krome.
Q Have you been at Krome ever since October 12th?
A Yes.
Q Joel, do you have any family here?
A Yes.
Q Who?
A I have my aunt here and my cousin.

of the date of this Order, pursuant to this policy, some class members have been in detention for over 11 months awaiting a determination on their claims for admission. The Court heard testimony that some non-Haitians in exclusion proceedings were not detained even though they arrived after the effective date of the new policy. Most of the testimony in this regard was general but some specific examples were given. While it appeared some of these individuals were clearly excludable, the evidence was insufficient to establish that they had similar immigration status but were treated differently than Plaintiffs.

In addition to the testimony regarding disparate treatment, both parties introduced documentary evidence on the number of Haitians versus non-Haitians being detained and paroled. The evidence shows that both Haitians and non-Haitians are being detained, but that more Haitians are being detained and for longer periods of time than non-Haitians. The evidence also demonstrates that a larger percentage of non-Haitians are granted parole or deferred inspection than the percentage of Haitians. Plaintiffs' expert statistician interpreted this data to mean there is a statistically significant relationship between being detained and being Haitian. The Court does not quarrel with this conclusion but believes that it does not deserve much weight in determining the merits of Plaintiffs' discrimination claim.

Parole is not a random process and the probability of parole is not the same for every person. The decision to grant a deferred inspection takes into account many factors not contained in the data analyzed by Plaintiffs' statistician. Factors that may be considered include the age and health of the alien as well as the reason he does not appear entitled to enter this country. Other factors include being accompanied by a minor and pendency of an I–130 application. These factors, with the exception of documentation, were not separately analyzed by Plaintiffs' expert. With regard to his analysis of the significance of possessing documents it was far too simplistic because it did not distinguish between the types of documents possessed and the facial validity thereof. The evidence before the Court simply did not establish the existence of a statistically significant relationship between being detained and being Haitian in the context of similarly situated individuals. The only conclusion that can be drawn from this evidence is that Haitians are being impacted by the detention

Q Where does your aunt live?
A Miami.
Q Do you have any family in Krome, Joel?
A Yes, a brother of mine.
Q How old is he?
A Twenty-three.
Q Joel, are you able to stay with your brother in Krome?
A No. They don't put me in the same place as he.
Q Do you know why?
A No.

BY MR. KURZBAN:

Q Can you state your full name for the record please?
A Hendrick DeSulme.
Q Mr. DeSulme, when did you come to the United States?
A August 9, 1981.
Q Did you come here alone or were you accompanied by anyone?
A Accompanied by my cousin and my child.
Q How old is your child?
A Two.
Q Boy or girl?
A A boy.
Q When you said before they asked you who should take care of whether or not your child could go with your cousin?
A Yes.
Q Your cousin was in the camp at the time?
A Yes. She was on the female side.
Q They did not release your son at that time?
A Never.
Q How long was your son at Krome?
A A month and a half.
Q When your son was released, did you ask to be released also?
A They had transferred me to Otisville. They had kept my child and released him after I left.
Q Did you tell immigration anything with respect to whether or not you wished to be transferred because your son was at Krome?
A When I was being transferred I called Mr. Garcia and I told Mr. Garcia, my child is my own child. He has lost his mother. I am his mother and his father both. That means that wherever I go is where he should be. He told me, "shut up."

policy to a greater degree than aliens of any other nationality at the present time.

Detention was not and is not intended to be an end in itself. It was proposed and adopted as an integral part of an overall revision of our immigration policy. At or about the time detention began, other changes in the exclusion procedure were being implemented. These changes included (1) immediate service on the alien of a notice to appear for an exclusion hearing (I–122), (2) interviews with the alien prior to the hearing to determine the nature of his claim for admission and (3) mass exclusion hearings. In response to these changes in the hearing procedure, this lawsuit was instituted.[25] On September 30, 1981 *nunc pro tunc* September 9, 1981, Judge Hastings entered a Temporary Restraining Order, later converted into a preliminary injunction, that prohibited the Defendants from holding exclusion hearings for class members.[26] That Order did not address the issue of the propriety of Plaintiffs' detention.

In the summer of 1981, the Krome detention facility became severely overcrowded. This condition resulted from a combination of factors including HRC's assumption of legal responsibility for representing over 500 Haitians detained at Krome, the filing of this lawsuit and subsequent injunction of exclusion proceedings by Judge Hastings and the continuous flow of Haitians into South Florida.

In July 1981, the State of Florida instituted suit against the Federal Government because of the overcrowding at Krome. In the course of the litigation, the Government represented that efforts would be made to keep the population at Krome at or under 1000 persons. In order to abide by this representation to the Court, the Government had to start transferring Haitians out of Krome whenever the population exceeded 1000.

As space became available in July 1981, the Government transferred Haitians from Krome to other INS detention locations, including Fort Allen, Puerto Rico; Brooklyn, New York, and to facilities made available by the Bureau of Prisons in places such as Otisville and Raybrook, New York; Latuna and Big Springs, Texas; Lexington, Kentucky; Morgantown and Alderson, West Virginia.[27] Pursuant to the new de-

25. The Complaint originally contained seven counts that challenged a broad range of policies and practices utilized by INS during exclusion proceedings. In a prior Order, this Court held that Section 106 of the Immigration and Nationality Act (hereinafter ("INA"), 8 U.S.C. § 1105a, precluded judicial review of four entire counts and portions of two other counts. That ruling was based on the Court's finding that Congress intended the procedure set forth in Section 1105a to wit, habeas corpus, to be the sole and exclusive means to challenge determinations made during the incident to exclusion proceedings. In addition, the Court found that habeas corpus was available to challenge those determinations only after a final order of exclusion had been entered and all available administrative remedies were exhausted. *See Louis v. Meissner*, 532 F.Supp. 881 (S.D.Fla. 1982).

Two issues, set forth in three counts, survived the Court's Order of Dismissal. The first issue, and the question of primary importance to these class members, is whether they are lawfully being detained pending the outcome of their exclusion proceedings. The second issue is whether persons in detention have a right of access to persons on the outside, and vice versa.

In light of the dismissal the Court intimates no view on the propriety of the putatively illegal practices. Testimony in this regard was admitted solely for the purpose of establishing discrimination in that these practices allegedly departed from normal exclusion procedures and were applied solely to Haitians. While the Court believes these practices to be a departure from the normal procedure, it does not find that they were applied solely to Haitians or that the Defendants implemented these practices with any intent to discriminate against Plaintiffs due to their race and/or national origin.

26. *Louis v. Meissner*, 530 F.Supp. 924, 926 (S.D.Fla.1981).

27. The Court finds that the transfer of Haitians to these areas was necessary in order to comply with the Government's representations in the suit brought by the State of Florida regarding the population at the Krome detention facility. *Graham v. Smith*, Case No. 81–1497–CIV–JE (S.D.Fla.). *See* Defendants' Exhibit C. The evidence does not support Plaintiffs' contention that these transfers were intended to deny Plaintiffs' access to counsel and to punish or otherwise discriminate against Plaintiffs.

tention policy, approximately 2100 individual Plaintiffs continue to be incarcerated in these various detention facilities.

D. THE CLASS—PLAINTIFFS' CLAIMS

The Plaintiffs herein are the Haitian Refugee Center, Inc., Lucien Louis, Wilner Luberisse, Jean Louis Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard, Joel Casimir, Job Dessin and Prophete Talleyvand, on behalf of themselves and all others similarly situated.[38] The class certified by the Court consists of:

> All Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and also are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either:
>
> 1) Unrepresented by counsel;
>
> or
>
> 2) Represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.

Plaintiffs have advanced a two-prong attack on the Government's new detention policy. They argue first that before the policy was instituted, they were entitled, under the provisions of the Administrative Procedure Act (hereinafter "APA"), to notice and an opportunity to comment. *See* 5 U.S.C. § 553. INS' failure to follow this procedure, they claim, requires this Court to find their detention to be unlawful. Second, Plaintiffs contend that the detention policy is discriminatory on its face in that only Haitians fall within its purview. In the alternative, if the policy is construed to apply to all excludable aliens, Plaintiffs claim it is being applied unequally to their detriment. Thus, the essence of their second argument is that the detention policy is illegal because it is discriminatory on its face and/or in its application. Plaintiffs claim such discrimination violates the Equal Protection guarantees of the Fifth Amendment to the United States Constitution as well as the provisions of Articles 3 and 31 of the United Nations Convention and Protocol Relating to the Status of Refugees, to which the United States is a signator. *See* 19 UST 6260 T.I.A.S. No. 6577 (the "Convention"); 19 UST 6223, T.I.A.S. No. 6557 (the "Protocol").

E. JUSTICIABILITY

Prior to contesting the merits of the claims before the Court, Defendants raised three issues of justiciability: exhaustion of administrative remedies, the political question doctrine and standing. Some of these issues have been partially addressed in a prior Order of the Court but apparently they have not been put to rest.[39] Because

However, the evidence does indicate that no effort was made by INS to determine whether the Haitians being transferred were represented by counsel in Miami, or had relatives in Miami (in or out of detention). Notice of the transfers, and the purpose and method thereof, was not given to the Haitians in order to allow them to notify their family and to alleviate any fears they may have had that they were being sent back to Haiti. Moreover, once the Haitians arrived at their respective destinations, they were not given access to telephones so they could contact their families and friends. Thus, the transfers were necessary but the manner in which they were carried out left much to be desired. *See Order Granting in Part and Denying in Part Defendants' Motion for Permission to Transfer Class Mem.*, s. docket no. 365, dated March 26, 1982.

38. Plaintiff, Haitian Refugee Center, Inc. (hereinafter HRC) is a not-for-profit corporation organized under the laws of the State of Florida on September 17, 1980. The stated purposes of HRC are to "promote the well-being of Haitian Refugees through appropriate programs and activities" including but not limited to legal representation. The by-laws of HRC were approved on February 27, 1981, and provide that HRC's membership consists of "the Haitian Refugee Community in Florida and members of the community at large who have shown support and interest for the defined purposes and activities of the corporation". Defendants' Exhibits D and E.

Plaintiffs, Lucien Louis, Wilner Luberisse and Job Dessin have been paroled by INS.

39. The Court's Order of Dismissal, note 25, *supra*, only dealt with the question of whether 8 U.S.C. § 1105a barred the Court from exer-

these challenges go to the heart of the Court's power to adjudicate the case before it, the Court will take this opportunity to set forth its reasons for exercising jurisdiction.

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants contend that this lawsuit is an improper attempt to procure the release *en masse* of detained Haitians even though they have made no showing that some or all of the aliens have requested parole and parole has been denied. Until Plaintiffs request the District Director to exercise his discretion to parole them, Defendants believe judicial intervention is inappropriate.

Plaintiffs have countered this argument by introducing evidence that some, if not all, of the class members have requested parole. The evidence consists of written requests for parole made on behalf of Haitians in detention by relatives, the Haitian Refugee Center, Inc., privately retained attorneys, pro bono attorneys, and religious and charitable organizations. There is also testimony that class members regularly make oral requests for release to the INS officials at the various detention facilities.[30] Plaintiffs argue that the Court should take jurisdiction over their claims even if the evidence does not support a finding that all class members requested parole because their claims fall within certain exceptions to the exhaustion rule and a balancing of equities mandates judicial intervention at this time.

[1] A party will normally be denied judicial relief until the administrative remedies available to him have been exhausted. By refusing to interrupt the administrative process, several policies are advanced: (1) a more complete record is developed; (2) the agency is allowed to exercise its discretion or expertise; (3) the agency is allowed to correct its own errors and (4) the agency is not weakened by easy circumvention of its procedures. *See generally Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408 (1938); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 S.Ct. 459, 82 L.Ed. 638 (1938); *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969).

[2] However, the exhaustion doctrine should not be rigidly applied. It is a flexible concept that must be tailored to the administrative statutes and circumstances peculiar to the case. Thus, the failure of one or more of the Plaintiffs to exhaust his administrative remedies does not automatically preclude the Court from hearing their claims.[31] That decision must be based on a balancing test that employs the policy factors favoring exhaustion and the circumstances peculiar to Plaintiffs' case that favor judicial review. *See Ecology Center of Louisiana Inc. v. Coleman*, 515 F.2d 980 (5th Cir. 1975).

cising jurisdiction over Plaintiffs' claims. It was not intended to be dispositive of all Defendants' jurisdictional and sufficiency challenges to the complaint. Although the Court addressed the exhaustion and standing issues in that Order, it did so solely in the context of the claims dismissed and did not specifically deny Defendants objections to Plaintiffs' APA and discrimination claims.

30. The Court finds that all of the Plaintiff class members did not request parole. However, the Court believes INS had constructive and/or actual knowledge that Plaintiffs wanted to be released.

Moreover, it is significant to note that the administrative procedure for seeking parole does not require an application to be filed, a hearing to be held or a record to be made. *See* 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5; INS O.I. 212.5a. Thus, an excludable alien may be paroled, or granted a deferred inspection by the examining immigration officer at the airport or seaport without ever asking for parole. The District Director's decision to grant or deny parole is not reviewable by the BIA and appears to be a final order thereby reviewable in this Court. *See* 8 C.F.R. § 3.1(b); *Pierre v. United States*, 547 F.2d 1281, 1284–86 (5th Cir. 1977); *Ahrens v. Rojas*, 292 F.2d 406, 410 (9th Cir. 1961).

31. Exhaustion is not a jurisdictional prerequisite to review. Whether exhaustion should be required is a matter committed to the sound discretion of the trial court. *NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 419, 420 n.8, 88 S.Ct. 1717, 1718, 1722 n.8, 20 L.Ed.2d 706 (1968); *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 980, 985–86 (5th Cir. 1975).

Continuous use of the balancing test has resulted in the judiciary's development of several exceptions to the exhaustion rule. In *Patsy v. Florida International University*, 634 F.2d 900 (5th Cir. 1981) the Fifth Circuit, sitting *en banc*, stated:

> Briefly the traditional exceptions are *first*, exhaustion is not required when the prescribed administrative remedy is plainly inadequate because either no remedy is available, the available remedy will not give relief commensurate with the claim, or the remedy would be so unreasonably delayed as to create a serious risk of irreparable injury. *Walker v. Southern Railway*, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294 (1966); *Frozen Food Express v. United States*, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 910 (1956); *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 66 S.Ct. 1000, 90 L.Ed. 1192 (1946); *United States Alkali Export Association v. United States*, 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945); 3 K. Davis, Administrative Law § 20.07 (1958 and Supp.1970, 1976 & 1978).
>
> *Second*, when the claimant seeks to have a legislative act declared unconstitutional and administrative action will leave standing the constitutional question, exhaustion is not required. *Public Utilities Commission v. United States*, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958); Davis, *supra*, at § 20.04.
>
> *Third*, courts do not require exhaustion when the question of the adequacy of the administrative remedy is for all practical purposes co-extensive with the merits of the plaintiff's claim, such as when, for example, the plaintiff contends that the administrative system itself is unlawful or unconstitutional in form or application. *Fuentes v. Roher*, 519 F.2d 379 (2d Cir. 1975); *Finnerty v. Cowen*, 508 F.2d 979, 982–83 (2d Cir. 1974).
>
> *Fourth*, exhaustion of administrative remedies is not required if it would be futile to comply with the administrative procedures because it is clear that the claim will be rejected. *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24, 54 S.Ct. 259, 78 L.Ed. 628 (1934); *Montana National Bank v. Yellowstone County*, 276 U.S. 499, 48 S.Ct. 331, 72 L.Ed. 673 (1928).

634 F.2d at 903–04.

[3] In the case at bar, the Court believes that the third and fourth exceptions to the exhaustion rule make Plaintiffs' claim justiciable. The administrative remedy available is co-extensive with Plaintiffs' claim in that the form and application of the remedy is under attack on statutory and constitutional grounds. Clearly, INS has no power to adjudicate the legality of its own policy under the provisions of the APA and the agency is similarly incapable of resolving the challenges to the manner in which the policy is applied. Moreover, its incapacity in this regard leads the Court to conclude that further attempts for administrative relief would be futile. The Court can see no rational purpose for requiring these class members to seek relief from the INS, since the law never requires one to do a useless act; here such a request would, with few exceptions, fall on deaf ears.

Nor does the Court feel that the policy factors favoring exhaustion will be advanced by requiring these Plaintiffs to request parole at this time.[32] First, the record before the Court is satisfactory in that it establishes the current criteria for release on parole. Individual administrative records are not necessary because the Court is

32. On June 14, 1982, the Attorney General announced a plan for the release of Haitians currently in detention, some of whom are class members. That announcement was made subsequent to the Court's decision in this case but prior to the issuance of this opinion. It is the view of the Court that the planned release in no way moots the issues herein and that it must be disregarded to the extent it might appear to bear upon the issue of discrimination.

INS' implementation of the Attorney General's parole plan does not affect the Court's analysis of the exhaustion issue. Because the Court is not reviewing individual parole decisions, further development of the administrative record would not materially aid the Court in making its decision as to whether the detention policy is unlawful.

not being asked to review individual parole decisions. The issue before the Court is legal, not factual, and further development of the administrative record would not significantly aid judicial review.[33] Second, allowing the agency to exercise its discretion would accomplish nothing if, as Plaintiffs allege, the District Directors either have no discretion to parole them, or use unlawfully adopted criteria for release when exercising their discretion.[34]

Finally, the Court is of the view that additional requests for parole will not result in a decision to change or correct this allegedly unlawful policy. Without a judicial determination that Plaintiffs' detention is unlawful, it appears that many of them will remain in custody and under these circumstances, allowing them to challenge their detention will not weaken the established administrative mechanism to attain release on parole.

Thus, after balancing the harshness of requiring exhaustion and the apparent inability of INS to provide relief against the factors favoring exhaustion, the Court finds that a dismissal on this ground is unwarranted. *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 1975).

2. THE POLITICAL QUESTION DOCTRINE

[4] The essence of Defendants' second challenge to the justiciable nature of this lawsuit is that:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. (Citations omitted).

Mathews v. Diaz, 426 U.S. 67, 81, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976). Parole of Haitians, Defendants contend, raises political questions over which this Court does not have jurisdiction.

It is inconceivable that the decision whether to detain or parole these class members would have a significant impact on the manner in which this country conducts its foreign policy. Assuming *arguendo* that the decision to detain excludable aliens is "intricately interwoven" with our foreign policy, the political question doctrine is inapplicable. The Court has not been called upon to determine the propriety of the detention policy and it intimates no view on the wisdom of the Administration's decision in this regard. Plaintiffs are asking the Court to decide whether their statutory and constitutional rights are being violated. To ensure that individuals are not injured by unlawful action in the immigration and naturalization context, courts rarely apply the political question doctrine when such challenges are brought. As one treatise notes:

> Finally, 'the pervasive influence of the political question doctrine on fields touching on foreign affairs has not led courts to surrender their power to protect individuals against government action. To the contrary, individual rights are protected carefully, although within a framework that takes account of the broad substantive powers of the other branches. *Harisiades v. Shaughnessy*, [342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952)] provides a much-invoked illustration. Ultimately the Court upheld the

33. The APA claim is strictly a legal issue and probably could have been resolved by summary judgment based on the parties' pretrial stipulation. Plaintiffs' discrimination claim is both factual and legal in nature. Whether the policy is discriminatory on its face is factual in that the parties do not agree on what the policy is. Whether the policy is being applied in a discriminatory fashion is also disputed. Notwithstanding the existence of these issues of fact, the court's decision would not have been aided by further development of the administrative record because the Court dismissed that portion of the complaint that individual parole and asylum claims were denied on discriminatory grounds. *See Louis v. Meissner*, 532 F.Supp. 881 (S.D.Fla.1982).

34. The Court does not believe INS has any particular expertise in deciding which aliens are good candidates for parole.

challenged deportation order, and it spoke tenderly of the threads weaving policy toward aliens into the pattern of political judgments dealing with foreign affairs. But it decided on the merits challenges based on due process, the First Amendment, and the ex post facto clause. Respect for the political branches affects, but does not preclude, decision on the merits.

13 Wright & Miller, Federal Practice and Procedure § 3534 at 314 (1976). (Footnotes omitted). For these reasons, the Court believes this case is justiciable notwithstanding the Supreme Court's admonition in *Mathews v. Diaz, supra.*

3. STANDING

The "three-part test [for standing to contest the validity of agency actions] established in *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970) and *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) . . . is: (1) the challenged action must result in injury-in-fact to the plaintiffs; (2) the interest invaded must be arguably within the zone of interest to be protected by the statute; and (3) there must be no statutory prohibitive of judicial services." *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1066 (5th Cir. 1979).

[5, 6] The injury-in-fact element of the standing test requires Plaintiffs to demonstrate a sufficiently direct and concrete injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), which is likely to be redressed if Plaintiffs prevail on the merits. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). The Plaintiff class members in the case *sub judice* have met this constitutional requisite for standing; their injury-in-fact consists of their continued, allegedly illegal, incarceration pending resolution of their political asylum claims.[35]

The second element of the standing test is mandated by the APA. A person who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof" under Section 10(a) of the APA. 5 U.S.C. § 702. A plaintiff satisfies the APA's standing requirement if his interests are arguably within the zone of interests that the statute in question was intended to protect or regulate. *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). The "relevant statute" is the agency's enabling act or other legislation under which the zone of interests is purported to exist. 5 B. Mezines, J. Stein & J. Gruff, Administrative Law § 50.03, at 50–25 (1980).

The Court believes that the "relevant statute" in the case at bar is Section 212(d)(5) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(d)(5); the statute which the agency's new policy authoritatively interprets.[36] *State of Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974). Although the statute speaks in terms of parole "for emergent reasons or for reasons deemed strictly in the public interest", parole has been characterized by the Supreme Court as a "device through which needless confinement is avoided while administrative proceedings are conducted." *Leng May Ma v. Barber*, 357 U.S. 185, 190, 78 S.Ct. 1072, 1075, 2 L.Ed.2d 1246 (1958). Viewed from the latter perspective, the interests Plaintiffs seek to advance, to

35. The Court believes that injury-in-fact is sufficient to confer standing on Plaintiffs. However, the Fifth Circuit apparently takes the position that injury alone is insufficient and, therefore, the Court will address the other aspects of the standing doctrine. *See Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C.Cir.1970) (Bazelon, C. J.).

36. Plaintiffs' standing to invoke Constitutional Protection is discussed in Section H1, *infra*. The Court notes, in light of that conclusion that Plaintiffs' claims fall within the zone of interest protected by the Constitution.

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wit, freedom pending resolution of their asylum claims, are arguably within the zone of interests sought to be protected by Section 212(d)(5) of the Immigration & Naturalization Act.

The final question is whether judicial review of agency action is prohibited. The Court's consideration of this question must of necessity encompass Defendants' claim that decisions regarding parole are not judicially reviewable because release on parole is committed to agency discretion within the meaning of Section 10 of the APA, 5 U.S.C. § 701(a)(2), by 8 U.S.C. § 1182(d)(5)(A).

As a general rule, "a person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. The general rule applies "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2).

The exception from APA review of agency action "committed to agency discretion" is a very narrow exception. *Save the Bay, Inc. v. Administrator of the E.P.A.*, 556 F.2d 1282, 1293 (5th Cir. 1977). The legislative history of the APA, referred to in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), indicates that the committed to agency discretion exception to judicial review is intended to be "applicable in those *rare* instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S.Rep.No.752, 79th Cong. 1st Sess. 26 (1945)." *Id.* at 410, 91 S.Ct. at 820.' (Emphasis added).

In construing 5 U.S.C. § 701(a) the Supreme Court has stressed the "basic presumption of review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). The burden of proving nonreviewability is on the agency involved. *See Id. Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *See Morris v. Gressette*, 432 U.S. 491, 501, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977); *Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971); *Tooahnippah v. Hickel*, 397 U.S. 598, 606, 90 S.Ct. 1316, 1321, 25 L.Ed.2d 600 (1970); *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 155–57, 90 S.Ct. 827, 830–31, 25 L.Ed.2d 184 (1970); *Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970). The reviewing court must determine "whether Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Morris v. Gressette*, 432 U.S. 491, 501, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977); *Barlow v. Collins*, 397 U.S. 159, 165, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970).

As no provision of the Immigration and Naturalization Act expressly precludes judicial review of the Attorney General's actions under § 212(d)(5), it is necessary to determine "whether unreviewability can fairly be inferred." [27] 397 U.S. at 166. *See Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 157, 90 S.Ct. 827, 831, 25 L.Ed.2d 184 (1970); *Switchmen v. National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943); *Morris v. Gressette*, 432 U.S. 491, 501, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977). That inquiry requires an evaluation of the legislative scheme as well as the practical and policy implications of judicial review. *Bullard v. Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), cert. *denied* 451 U.S. 907, 101

27. The Defendants do not contend that such a provision exists and rely instead on the argument that preclusion of judicial review may be inferred from the statutory scheme. This position is contrary to that taken by the Defendants with regard to INS' policies and practices used during or incident to exclusion proceedings. See Defendants' Memorandum in Support of their Motion to Dismiss, docket no. 114, filed Sept. 30, 1981, at p. 24.

S.Ct. 1975, 68 L.Ed.2d 295 (1981); *Local 2855 v. United States*, 602 F.2d 574, 575 (3rd Cir. 1969).

> There must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process. *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969). Criteria suggested by the Third Circuit in Local 2855 for making such a determination include (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.

623 F.2d at 1046.

Section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) provides in part "[t]he Attorney General may . . . in his discretion parole into the United States temporarily and under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States . . ." The Attorney General's discretion has been delegated to the District Directors by regulation, see 8 C.F.R. § 212.5, and the District Director has further delegated that authority to his subordinates provided they are not below the level of an officer in charge or an immigrant inspector in charge of a port of entry. *See* INS Operations Instruction 212.5.

[7] The fact that the statute by its terms permits rather than compels, agency action does not alone commit that action to the agency's unreviewable discretion. *See Mulloy v. United States*, 398 U.S. 410, 90 S.Ct. 1766, 26 L.Ed.2d 362 (1970); *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir.1970); cited in *Save the Bay, Inc. v. Administrator of the E.P.A.*, 556 F.2d 1282, 1293 (5th Cir. 1977). Nor can nonreviewability be inferred from the apparently broad discretion given INS in this area of operation. For many years, the statute's language has been construed to mean that aliens seeking admission to the United States should not be placed in physical incarceration unless they were a security risk to the United States or likely to abscond. This interpretation was recognized by the Supreme Court in *Leng May Ma v. Barber*, 357 U.S. 185, 190, 78 S.Ct. 1072, 1074, 2 L.Ed.2d 1246 (1958) and by INS in its Immigrant Inspector's Handbook. INS' Operations Instruction and the regulations, 8 C.F.R. § 212.5, appear to be consistent with this expansive reading of the parole provision because they give INS officials broad discretion to grant release on parole. Thus, the statute delineates some limits on INS' discretion to parole aliens and thereby provides a standard for courts to decide in particular cases whether there has been an abuse of discretion and application of the criteria require no special knowledge or expertise.

[8] The need for judicial review of parole decisions is apparent. Regardless of their status as excludable aliens, Plaintiffs are persons within the territorial jurisdiction of the United States and they cannot be denied their liberty without due process of law. *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976); *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 (11th Cir. 1982).[38] Judicial review is the only means to insure that aliens seeking parole get the process they are due. An alien's challenge to a denial of parole in no way affects or impedes INS' ability to proceed to determine his admissibility; and, therefore, the Court believes judicial review is feasible without disruption of the administrative process.

After reviewing the statute, regulations and legislative history thereof, the Court has been unable to find "clear and convincing evidence" that Congress intended to cut

38. See note 14, *infra*. *Pesikoff v. Sec. of Labor*, 501 F.2d 757, 760 n.3 (D.C.Cir.1974), *cert. denied*, 419 U.S. 1038, 95 S.Ct. 525, 42 L.Ed.2d 315 (1974).

off judicial review of parole decisions. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1969). Clearly, the Attorney General's decision involves some degree of discretion of judgment. But it cannot be said that, for this reason, his actions are unreviewable. Moreover, the Court believes that the need for and feasibility of judicial review far outweighs the potential disruption of the administrative process and it finds, therefore, that parole determinations are not committed to agency discretion by law and can be reviewed pursuant to 5 U.S.C. § 702.

Assuming *arguendo* that the substantive decision to parole is committed to agency discretion, judicial review is still available for limited, specific issues subsumed in the decision making process.[39] *See Ness Investment Corp. v. United States*, 512 F.2d 706 (9th Cir. 1975); *East Oakland Fruitvale Planning Counsel v. Rumsfeld*, 471 F.2d 524 (9th Cir. 1972); *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C.Cir. 1970), *vacated as moot*, 404 U.S. 403, 92 S.Ct. 557, 30 L.Ed.2d 560 (1972); *Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282 (5th Cir. 1977).

> Such partial review serves to protect individuals' interests adversely affected by agency action while imposing only limited, acceptable intrusion upon the administrative process and the dockets of the federal courts. *See Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv.L.Rev. 367 (1968). Along these lines it has been said that "[T]he question is not whether agency action is by law committed to agency discretion but to what extent agency action is so committed." 4 K. Davis, Administrative Law Treatise 33 (1958), quoted in *Medical Committee for Human Rights, Inc. v. SEC, supra*, 432 F.2d at 673 (Emphasis in quote).

556 F.2d at 1293.

The circumstances where judicial review is appropriate, in spite of a finding that agency action is committed to discretion by law, was cogently analyzed by the Ninth Circuit in *Ness Investment Corp. v. United States*, 512 F.2d 706 (9th Cir. 1975). The conclusion reached by the court was:

> Where consideration of the language, purpose and history of a statute indicate that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency.

512 F.2d at 715.

Plaintiffs seek to have the criteria for release declared unlawful because it was adopted in violation of the APA. Thus, the alleged abuse of discretion consists of a statutory violation not an error of judgment. Viewed from this perspective, the Court believes judicial review is permissible.[40]

39. Admittedly the question of whether individual parole decisions are reviewable pursuant to 5 U.S.C. § 702 is a close one. An equally compelling argument can be made against much review in light of the availability with habeas corpus review. *Rodriguez Fernandez v. Wilkinson*, 654 F.2d 1382, 1390 (10th Cir. 1981); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982); *Sorca-Gonzales v. Civiletti*, 515 F.Supp. 1049, 1001 (N.D.Ga.1981).

40. *See Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C.Cir.1974) where under similar circumstances the District of Columbia Circuit held:

> We have considered the Board's argument that its promulgation of parole selection criteria is not subject to judicial review—whether or not subject to the Act—because release on parole is committed to agency discretion within the meaning of Section 10 of the Act. 5 U.S.C. § 701(a)(2), by 18 U.S.C. § 4203(a). But we are not reviewing the granting or denying of parole in a particular case, action which may reflect an unreviewable exercise of agency discretion. We are not even reviewing the merits of the rules and standards the Board has adopted. The appellees' complaint and our consequent ad-

In summary, the Court finds that Defendants' challenges to Plaintiffs' standing lack merit. Plaintiffs have met the constitutional requisite for standing in that their continued allegedly illegal incarceration constitutes injury-in-fact. They have met the APA's standing criteria because they fall within the zone of interest of persons that the relevant statute was intended to protect or regulate. Finally, there is no statutory bar to judicial review and the Court cannot find any clear and convincing evidence that Congress intended to commit parole decisions to agency discretion.

F. SUBJECT MATTER JURISDICTION

[9, 10] United States District Courts are tribunals of limited jurisdiction; their power to hear a case is dependent upon congressional implementation of one of the Constitution's grants of subject matter jurisdiction. Plaintiffs as unadmitted and nonresident aliens occupy a unique position in the law. It is clear that they have no right to enter this country as nonimmigrants or otherwise. *Turner v. Williams*, 194 U.S. 279, 292, 24 S.Ct. 719, 723, 48 L.Ed. 979 (1904); *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950); *Galvan v. Press*, 347 U.S. 522, 530–32, 74 S.Ct. 737, 742–43, 98 L.Ed. 911 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 592, 72 S.Ct. 512, 520, 96 L.Ed. 586 (1952); *Kliendeinst v. Mandel*, 408 U.S. 753, 762, 92 S.Ct. 2576, 2581, 33 L.Ed.2d 683 (1972). "Whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned." 338 U.S. at 544, 70 S.Ct. at 313. The Defendants would have this Court rule that because Congress, when enacting the Immigration and Nationality Act, did not provide for judicial review of denials of requests for parole, federal courts have no jurisdiction to hear Plaintiffs' challenges to their detention.

Under the APA "[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. A person may be just as "affected or aggrieved" by agency action if he is an unadmitted alien as he would be if he was admitted. The Supreme Court and the Fifth Circuit have made this clear in their rulings in *Brownell v. We Shung*, 352 U.S. 180, 185, 77 S.Ct. 252, 255, 1 L.Ed.2d 225 (1956) and *Estrada v. Aherns*, 296 F.2d 690 (5th Cir. 1961); *see generally* C. Gordon & H. Rosenfeld, *Immigration Law and Procedure* § 8.8 (1980) (and cases cited therein). Even in cases involving unadmitted aliens, "[e]xceptions from the . . . Administrative Procedure Act are not lightly to be presumed, *Marcello v. Bonds*, 349 U.S. 302, 310, 75 S.Ct. 757, 761, 9 L.Ed. 1107 (1955), and unless made by clear language or supersedure the expanded mode of review granted by the Act cannot be modified." 352 U.S. at 185, 77 S.Ct. at 255. Thus, the judicial review provisions of the APA apply to unadmitted aliens unless Congress makes its intent to the contrary clear as it did when it enacted Section 106 of the INA, 8 U.S.C. § 1105a, in response to the *We Shung* case. The mere absence of a provision in the INA for judicial review of parole decisions is not a clear indication that Congress intended to cut off judicial review. The Court finds, therefore, that its jurisdiction was properly invoked pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, 2202; and Section 10(a) of the Administrative Procedure Act 5 U.S.C. § 702, and 8 U.S.C. § 1329.

The Court also believes that federal question jurisdiction exists pursuant to 28 U.S.C. § 1331. The allegations herein are consistent with the Eleventh Circuit's ruling in *Haitian Refugee Center, Inc. v.*

judication address themselves solely to the procedures by which those rules may be formulated. The justiciability of such a complaint depends upon Section 10, particularly subsection (e), of the Act, as already discussed, not the discretionary character of the Board's determinations as to when parole shall be granted. The giving of notice of rule-making and the consideration of consequent submissions by interested persons might inform, but would not otherwise impinge upon, the Board's discretion in framing its standards and guidelines.
507 F.2d at 1107.

Smith, 676 F.2d 1023 (11th Cir. 1982), in that Plaintiffs have claimed INS engaged in a "pattern, program or scheme ... to violate [their] constitutional rights..." *Id.*, 676 F.2d at 1033. To the extent it is not clear from Plaintiffs' amended complaint, the Court finds they have invoked habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241 and that jurisdiction exists pursuant to 8 U.S.C. § 1329 as well. *See Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1202–03 (9th Cir. 1975), and cases cited therein.[41]

G. ADMINISTRATIVE PROCEDURE ACT CLAIM—FAILURE TO PROMULGATE DETENTION POLICY AS A RULE

The evidence shows that prior to May 20, 1981, Haitian refugees arriving in this country, for whom the INS initiated exclusion proceedings, were detained for a brief period of time necessary for routine public health screening and released on parole into the community to relatives or voluntary agencies willing to act as sponsors. This "policy" abruptly changed sometime between May 20, 1981, and July 31, 1981; and a policy of detention was initiated. Under the new policy, parole is to be denied except for significant humanitarian reasons such as pregnancy or other health problems, extreme age or for the purpose of reuniting families. Pursuant to this policy, some class members have been in detention for over 10 months awaiting a determination of their right to remain in the United States.

[11] The essence of Plaintiffs' claim is that the detention policy is illegal because it is a substantive rule that was not promulgated as required by the Administrative Procedure Act (hereinafter the "APA"). Under the APA, an administrative agency is prohibited from adopting any substantive rule unless it first publishes notice of the proposed rule and provides interested persons an opportunity to comment. 5 U.S.C. § 553. Because this procedure was not followed, Plaintiffs claim the detention policy is void and unenforceable and that the Court must order their release.

Defendants admit that a new detention policy was instituted without employing rulemaking procedures, and that INS is an agency as defined by the APA. *See* 5 U.S.C. § 551(1). Notwithstanding these admissions, they contend Plaintiffs' APA claim lacks merit for two reasons. First, the Defendants say the change in detention practice is not a "rule" as that term is defined in 5 U.S.C. § 551(4). Second, assuming *arguendo* that the changes in detention and parole criteria constituted rulemaking, they argue the Attorney General's decision not to parole Haitian aliens would fall squarely within the Section 553(a)(1) and (b)(A) foreign policy and agency organization exceptions to the notice and comment requirements of 5 U.S.C. § 553.

Section 551(4) of Title 5 defines the word "rule" as:

> (4) the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting practices bearing on any of the foregoing.

This definition is inapplicable here according to the Defendants because "[i]n detaining the plaintiffs and other aliens, the Government is carrying out a clear legislative mandate. Accordingly, the Government need not rely upon any alleged rule of

41. The Court believes that its finding that jurisdiction exists to review parole decisions is consistent with all of the cases in this area. *Shaughnessy v. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953); *Ahrens v. Rojas*, 292 F.2d 406 (5th Cir. 1961); *Petition of Cahill*, 447 F.2d 1343 (2nd Cir. 1971); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982). While some of these courts found no merit to the aliens' claim for relief, jurisdiction to review those claims was never found to be lacking.

policy for its authority to detain plaintiffs. Instead, that authority is derived from an express statute."[42]

Although this argument appears to be initially convincing, when scrutinized, its superficial nature becomes readily apparent. The "legislative mandate" of section 235(b) is not as clear as Defendants would like the Court to believe.[43] Words used in statutes are to be given their ordinary meaning. *Perrin v. United States*, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979); *Malat v. Riddell*, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968); *Burns v. Alcala*, 420 U.S. 529, 95 S.Ct. 1180, 43 L.Ed.2d 469 (1975). Detain means not only "arrest" or "keep in custody" but also "to delay", "to retard", or "to restrain from proceeding". Black's law dictionary 404 (5th ed. 1979). The phrase "shall be detained" could mean that an excludable alien shall be incarcerated until a final determination of his admissibility *or* that his entry into the United States should be delayed until inquiry is made at an exclusion hearing.[44] Parole is perfectly consistent with such a reading of section 235(b) because, by definition, parole "shall not be regarded as an admission of the alien..." 8 U.S.C. § 1182(d)(5). But regardless of which view of the statute is correct, this analysis demonstrates that INS' detention policy reflects *their* interpretation of the statute and, therefore, it is a rule as defined by the APA.

Even if section 235(b) evidences a Congressional intent to incarcerate excludable aliens, section 212(d)(5), not section 235(b) is the relevant statutory provision because section 212(d)(5) gives the Attorney General the power to release excludable aliens on parole.[45] The new parole criteria reflect INS' interpretation of the statutory conditions for release, to wit, "for emergent reasons or for reasons deemed strictly in the public interest." Clearly, when INS announced new criteria for release on parole, and the ensuing detention policy, it constituted an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ..." which is a rule within the meaning of the Act.

In order to engage in rulemaking, the Act requires an agency to (1) provide adequate advance notice and publication of the proposed rule in the Federal Register; (2) afford interested persons an opportunity to participate through the submission of written data, views, or arguments, with or without opportunity for oral argument; (3) publish the final rule with a statement of basis and purpose not less than thirty days before its effective date; and (4) grant interested

42. *See* Government's Reply Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, docket no. 223, filed Jan. 8, 1982, at 27.

43. Section 235(b) of the Act, 8 U.S.C. § 1225(b) provides in part:

> Every alien ... who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.

44. The Court has not been called upon to decide whether Congress intended the term "shall be detained" to mean incarceration or simply preventing an entry from being made. While this Court intimates no view on Congress' intent in this regard, it notes that the Fourth Circuit has interpreted this language to authorize indefinite incarceration of a permanently excluded alien after an unsuccessful attempt to return him to his homeland has been made. *Palma v. Verdeyen*, 676 F.2d 100, 104 (4th Cir. 1982).

45. Section 212(d)(5)(A) of the Act, 8 U.S.C. § 1182(d)(5)(A) provides in part:

> The Attorney General may, in his discretion, parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

persons the right to petition for the issuance, modification or repeal of a rule. 5 U.S.C. § 553(b)–(e).

The APA contains certain exceptions to the notice and comment requirements of Section 553. Specifically, the Act's requirements do not apply to (1) military or foreign affairs; (2) internal management or proprietary affairs; (3) interpretative rules, general statements of policy, or rules of practice and procedure; and (4) situations in which good cause exists for dispensing with notice and comment requirements. 5 U.S.C. § 553(a)(1), (2) and (b)(A). However, the courts have repeatedly recognized that the various exceptions to the notice and comment requirements of section 553 are to be narrowly construed.

> Congress was alert to the possibility that these exceptions might, if broadly defined and indiscriminately used, defeat the section's purpose. Thus the legislative history of the section is scattered with warnings that various of the exceptions are not to be used to escape the requirements of section 553. *See, e.g.* S.Doc.No. 248, 79th Cong.2d Sess. 19, 199, 258 (1946).... Further, the Senate Committee responsible for considering the APA concluded its report by investing courts with a "duty ... to prevent avoidance of the requirements of the bill by any manner or form of indirection...." *Supra*, 79th Cong.2d Sess. 19, at 217. In sum, as this court said in *Humana of South Carolina v. Califano*, 590 F.2d 1070, 1082 (D.C.Cir.1978). "The salutary effect of the Act's public comment procedures cannot be gainsaid, so only reluctantly should courts recognize exemptions therefrom."

American Bus Association v. United States, 627 F.2d 525, 528 (D.C.Cir.1980). *Accord*, *National Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377 (2d Cir. 1978); *Housing Authority v. United States Housing Authority*, 468 F.2d 1 (8th Cir. 1972).

It is the view of the Court that the Defendants' reliance upon the foreign policy exception is not well founded. The case law involving foreign policy exceptions is extremely sparse. Research has disclosed no Supreme Court decisions directly on point, nor any from the Fifth or Eleventh Circuits. The meager authority for finding in this area and the courts' narrow view of the APA exceptions are, in and of themselves, reasons for the Court to hesitate to find the exception applies here. Moreover, the cases cited by Defendants, *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980); *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir.1979) are clearly distinguishable from the case *sub judice*.

Those cases involved challenges to regulations governing the immigration status of Iranian nationals in the United States during the hostage crisis. The "good cause" and foreign policy exceptions to the notice and comment provisions were found to apply because there was no way to predict how the regulations would have affected the "attitude and conduct of the Iranian government." 617 F.2d at 748. Under the circumstances, deference to the Executive's choice of procedures was advisable.[46] But the *Yassini* court emphasized the limited applicability of this exception in a footnote, stating that "[t]he foreign affairs exception would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs. *See Hou Ching Chow v. Attorney General*, 362 F.Supp. 1288 (D.D.C.1973). For the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences. S.Rep.No. 752, 79th Cong. 1st Sess. 13 (1945). As we discuss, this is the case here." 618 F.2d at 1360 n.4.

Nothing in the record before this Court supports a finding that promulgation of the new parole criteria, under the provisions of 5 U.S.C. § 553, would have resulted in "un-

46. It is significant to note that in spite of the unstable situation in Iran, the regulations challenged in *Malek-Markzban v. INS*, 653 F.2d 113, 115 (4th Cir. 1981) were promulgated but not subject to notice and comment. In the case at bar no effort was made to comply with the APA.

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desirable international consequences."[47] To the contrary, publication may have enhanced the deterrent effect of the new policy and deterrence is one of the goals the Government sought to attain by initiating the detention policy. At best, the connection between the detention policy and this country's conduct of foreign affairs is tenuous and certainly not substantial enough to find that it is exempted from the APA's rulemaking procedures under 5 U.S.C. § 553(a)(1).

The APA also exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure or practice" from the notice and comment requirements. 5 U.S.C. § 553(b)(A). Although the Act draws this distinction, it does not define the differences between the categories themselves. The Government contends that the new release criteria constitute an interpretative rule or general statement of policy. The Court, however, must determine the category into which the rule falls. "[T]he label that the particular agency puts upon its given exercise of administrative power is not ... conclusive; rather it is what the agency does in fact." *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481 (2d Cir. 1972); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416, 62 S.Ct. 1194, 1199, 86 L.Ed. 1563 (1942).

[12] A substantive rule, subject to notice and comment procedures, as opposed to an interpretative rule which is exempt, is a rule made by an agency pursuant to its delegated power to make rules having the force of law if they are constitutional, within the granted power and issued according to proper procedure. K. Davis, Administrative Law Text § 5.03, at 126 (1972). The Attorney General's Manual on the APA defines substantive rules as "rules other than organizational or procedural ... issued by an agency pursuant to statutory authority and which implement the statute... Such rules have the force and effect of law." *Id.* at p. 30 n. 3. Such rules change "existing rights and obligations." *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972); B. Schwartz, *Administrative Law* 154 (1976).

Interpretative rules are "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." The Attorney General's Manual at 30 n.3 (1947). Perhaps the most often cited definition of interpretative rules is that provided by the District of Columbia Circuit: "Generally speaking, it seems to be established that 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means." *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir.1952); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979).

A general statement of policy is a statement by an administrative agency announcing motivating factors the agency will consider, or tentative goals toward which it will aim in determining the resolution of a substantive question or regulation.

> A general statement of policy ... is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.

Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C.Cir.1974); *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979).

Clearly, the new detention policy is not a general statement of policy that INS hopes to implement in the future. It is being implemented right now! Nor does it set a

47. Mere promulgation of the detention rules might have been sufficient if it took place, for example, in the midst of another boatlift. But the circumstances under which detention was initiated were not sufficiently of an emergency nature to allow the foreign policy exception to apply.

goal that future proceedings *may* achieve, for the change has been presented as a *fait accompli*. Immediately upon its effective date the former practice of freely paroling Haitians into the community ceased and a new policy paroling only humanitarian cases began. Thus, the new criteria for release is not exempt from APA requirements as a "general statement of policy".

In *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979), the Fifth Circuit stated:

> The proper test to be applied in considering a rule that may arguably fall under the exemptions for "procedural rules" is as stated by *Pharmaceutical Manufacturers Association v. Finch*: "[W]hen a proposed regulation of general applicability has a *substantial impact* on the regulated industry, notice and opportunity for comment should first be provided." 307 F.Supp. 858, 863 (D.Del.1970) (emphasis added). The exemption of section 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated. *See Aiken v. Obledo*, 442 F.Supp. 628, 649–50 (E.D.Cal. 1977). Our inquiry, therefore, is not whether the rule is "substantive" or "procedural", but rather whether the rule will have a "substantial impact" on those regulated.

607 F.2d at 701–02.

Applying this test to the facts of the case at bar leads inescapably to the conclusion that the new detention policy is a substantive rule that is not exempt from the APA's rulemaking requirements. The new release criteria radically depart from the existing practice of regularly releasing Haitian aliens. It makes detention the rule, not the exception; and prescribes very narrow circumstances where parole will be allowed. Upon implementation, the new policy had an immediate and substantial impact on the Plaintiffs. The Court cannot think of any administrative action that would have a greater impact on a regulated group of people than a change in policy which results in their indefinite incarceration where, under the previous policy, they would have been free.[48] It is true that the prior policy was never formalized by a written requirement or by its adoption in a formal rulemaking proceeding. It is equally true that under the old policy, Haitians could not claim a substantive right to parole. But a change in a longstanding informal practice is as much a rule as repeal of a formal regulation if the result has a substantial impact on those regulated. *See Pharmaceutical Manufacturers Association v. Finch*, 307 F.Supp. 858 (D.Del.1970); *National Motor Freight Traffic Association v. United States*, 268 F.Supp. 90 (D.C.1967), aff'd per curiam, 393 U.S. 18, 89 S.Ct. 49, 21 L.Ed.2d 19 (1968). Here the policy change had a substantial impact, it constitutes a substantive rule and it should have been adopted in accordance with the APA's rulemaking provisions.

H. INVIDIOUS DISCRIMINATION QUESTION

The Court has concluded that the new detention policy was adopted in a procedurally defective manner and that Plaintiffs' continued incarceration pursuant to that policy is unlawful. Technically, the Court need not go further in order to resolve Plaintiffs' other claim for relief.[49] However, considerations of judicial economy and

48. Based on the Court's finding in Section H1, *infra*, any rule or regulation that is promulgated must not be discriminatory on the basis of race or national origin. However, to the extent detention is a function of presentation of a prima facie asylum claim, the Court does not believe that reference to the applicant's national origin would necessarily constitute discrimination.

49. The Court has endeavored to rule on the propriety of Plaintiffs' detention as expeditiously as possible. In order to do so, the Court has not made factual findings or conclusions of law with regard to Plaintiffs' First Amendment claims. Depending on the type of relief awarded Plaintiffs and the speed with which it is implemented, the First Amendment claim may become moot. The Court will make that determination after the June 23, 1982, hearing on relief.

fairness compel the Court to reach the other issue because a failure to do so might require these parties to spend years litigating this case before the Court of Appeals only to have it returned here for findings on issues already tried.

1. THE EQUAL PROTECTION CONCEPT INCORPORATED IN THE FIFTH AMENDMENT

[13] The Supreme Court has held that, under the Constitution, aliens seeking to enter the United States "may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by its sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall provide." *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). Congress has plenary power to decide *which aliens* shall be allowed to enter and *what procedure* shall be used to determine their admissibility. "Whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned." 338 U.S. at 543, 70 S.Ct. at 312, citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146 (1892); *Ludecke v. Watkins*, 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948).

If an alien seeking admission could challenge the constitutionality of Congress' decision whether and how to admit him the sovereign's power to control its borders would be compromised. Accordingly the Supreme Court has said "the Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Kwong Hai Chew v. Colding*, 334 U.S. 590, 596 n.5, 73 S.Ct. 472, 477 n.5, 97 L.Ed. 576 (1953). But the Court has never held, as Defendants contend, "the Constitutional guarantees of the Fifth Amendment do not extend to unadmitted aliens."

Plaintiffs are excludable aliens. Their ultimate goal appears to be admission to the United States. However, their claim before this Court does not relate to admission and does not challenge Congress' power in that regard. Plaintiffs' claim is that they cannot be denied parole, pending a determination of their admissibility, because of their race and/or national origin.

[14] Parole by definition "shall not be regarded as an admission of the alien..." 8 U.S.C. § 1182(d)(5). The parole sought by Plaintiffs consists of temporary release into the community while their political asylum claims are being prepared and processed; a process that can take years, if appealed. Parole, in this sense, is equivalent to pre-trial bond for a criminal defendant. In both cases, the primary considerations are protection of the community and ensuring that the individual appears for trial. When requesting release on parole, Plaintiffs are entitled to the same constitutional protections afforded all persons within the territorial jurisdiction of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896); *Doe v. Plyler*, 628 F.2d 448, 454 (5th Cir. 1980), *app. pending*, 50 U.S.L.W. 3462; *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981). Plaintiffs may not be deprived of their liberty without due process of law and cannot be denied parole solely because of their race and/or national origin.

[15] It is important to note that the actions challenged herein are *not* Congressional. Plaintiffs allege the Defendants are applying a neutral statute in a discriminatory fashion. This distinction, between legislation and enforcement, is critical. *Congress* can legitimately make distinctions among and against aliens that would be unacceptable if applied to citizens, *Mathews v. Diaz*, 426 U.S. 67, 80, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976), but "[i]n the *enforcement of these policies*, the Executive Branch of the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 530, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (Frankfurter, J.), cited in, *Fiallo v. Bell*, 430 U.S. 787, 792 n. 4, 97 S.Ct. 1473, 1478 n. 4, 52 L.Ed.2d 50 (1977). (Emphasis added). "A statute, otherwise neutral in its face, must not be applied so as invidiously to discriminate on the

basis of race. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 [6 S.Ct. 1064, 1070, 30 L.Ed. 220] (1886)." *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976).

2. PROOF OF DISCRIMINATION UNDER THE FIFTH AMENDMENT

[16] While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954); *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964); *United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982). The "[E]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 23, 96 S.Ct. 612, 636, 46 L.Ed.2d 659 (1976); *United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982). Thus, the analysis in cases involving claims of discrimination of federal officers in violation of the Fifth Amendment parallels the equal protection doctrine under the Fourteenth Amendment.

[17, 18] The type and level of proof required to establish a *prima facie* case of discrimination on the basis of national origin is essentially the same as that required in cases of racial discrimination. *See e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), cited in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1976); *Castenada v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1976). In order to establish a claim of discrimination under the Equal Protection clause, Plaintiff must show the Defendant intentionally or purposefully discriminated against him. 429 U.S. at 265, 97 S.Ct. at 563; *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 205, 93 S.Ct. 2686, 2696, 37 L.Ed.2d 548 (1973); *Wright v. Rockefeller*, 376 U.S. 52, 56–57, 84 S.Ct. 603, 605–06, 11 L.Ed.2d 512 (1964); *Akins v. Texas*, 325 U.S. 398, 403–404, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945). A plaintiff need not prove that a discriminatory purpose was the sole, dominant or even primary purpose in the challenged action, but must show it has been "a motivating factor in the decision." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265–66, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). The plaintiff need only show that the challenged decision was "in part" the result of a discriminatory purpose. *City of Mobile v. Bolden*, 446 U.S. 55 at 72 n. 17, 100 S.Ct. 1490, 1502 n.17, 64 L.Ed.2d 47 (1980); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). No particular degree of discriminatory intent need be shown, only its existence.

The Supreme Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), outlined the factors a Court should consider in a case of alleged discrimination.

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another." *Washington v. Davis, supra*, [426 U.S. 229] at 242 [96 S.Ct. 2040 at 2049, 48 L.Ed.2d 597]—may provide an important starting point.
>
> Sometimes a clear pattern unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*, 118 U.S. 356 [6 S.Ct. 1064, 30 L.Ed. 220] (1886); *Guinn v. United States*, 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340] (1915); *Lane v. Wilson*, 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281] (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 [81 S.Ct. 125, 5 L.Ed.2d 110] (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is

not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. *See Lane v. Wilson, supra; Griffin v. School Board*, 377 U.S. 218 [84 S.Ct. 1226, 12 L.Ed.2d 256] (1964); *Davis v. Schnell*, 81 F.Supp. 872 (SD Ala.), *aff'd per curiam*, 336 U.S. 933 [69 S.Ct. 749, 93 L.Ed. 1093] (1949); cf. *Keyes v. School Dist. No. 1, Denver, Colo., supra*, [413 U.S. 189] at 207 [93 S.Ct. 2686 at 2697, 37 L.Ed.2d 548]. The specific sequence of events leading up to the challenged decision also may shed some light on the decision maker's purposes. *Reitman v. Mulkey*, 387 U.S. 369, 373–376 [87 S.Ct. 1627, 1629–1631, 18 L.Ed.2d 830] (1967); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 [56 S.Ct. 444, 449, 80 L.Ed. 660] (1936). Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. *See Tenney v. Brandhove*, 341 U.S. 367 [71 S.Ct. 783, 95 L.Ed. 1019] (1951); *United States v. Nixon*, 418 U.S. 683, 705 [94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039] (1974); 8 J. Wigmore, Evidence § 2371 (McNaughton rev. ed. 1961).

429 U.S. at 267–268, 97 S.Ct. at 564–65.

[19] Other factors which courts may consider in determining the existence of discriminatory purpose are: the foreseeability of discriminatory impact, *Columbus Board of Education v. Penick*, 443 U.S. 449, 464–65, 99 S.Ct. 2941, 2949–50, 61 L.Ed.2d 666 (1979); knowledge of discriminatory impact, *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1050 (6th Cir. 1977); absence of any valid interest being served, *United States v. Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977) (Austin III), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979); and the availability of less discriminatory alternatives, *United States v. Board of School Commissioners of Indianapolis*, 573 F.2d 400, 413 (7th Cir. 1978). With these factors in mind, the Court will now proceed to address the case before it.

3. DISPROPORTIONATE IMPACT

[20] It is undisputed that Haitians are impacted to a greater degree by the new detention policy than aliens of any other nationality at the present time. The question is whether this fact is unexplainable on grounds other than race and/or national origin. The evidence shows that a major reason for the continued incarceration of Haitians is the injunction that prevents the holding of exclusion hearings *only* for Haitians. The injunction was entered at the behest of Plaintiffs' counsel herein prior to assignment of this case to the undersigned Judge.

Another reason is the State Department's position, be it right or wrong, that a prima facie case of asylum is not established solely by virtue of the fact that a Haitian national has left his homeland. Without the opportunity to present further evidence that there is a well-founded fear of persecution upon return to Haiti, the individual Plaintiffs herein cannot establish a prima facie case of asylum thereby entitling them to release on parole. Finally, there is some evidence in the record that aliens of other nationalities, particularly Mexicans, when faced with the choice of staying in detention or voluntarily departing the country, choose the latter alternative.

On the other hand, Haitians cannot voluntarily withdraw their applications for admission without Court approval and, therefore, release of Haitians who desire to voluntarily depart is significantly delayed. All of these factors combined result in the situation that exists today and the consequen-

tial appearance of a disproportionate impact on Haitians.

4. HISTORICAL BACKGROUND

Throughout the trial of this cause, Plaintiffs have emphasized Judge King's finding in *Haitian Refugee Center, Inc. v. Civiletti*, 503 F.Supp. 442 (S.D.Fla.1980), that INS discriminated against Haitian nationals when their asylum claims were denied *en masse*.[50] Plaintiffs believe, and would like this Court to conclude, that the practices challenged herein are a mere continuation of the prior INS policy against excludable instead of deportable Haitians. The Court finds, however, that Plaintiffs' contentions in this regard are simply without merit.

The policies and practices challenged herein, including detention, were proposed to and approved by the President of the United States in the context of developing a comprehensive new immigration policy. A change in policy was needed because the old one was not working. This fact was demonstrated by the increased flow of Haitians to South Florida during the years 1977 to 1980 and by the massive influx of Cubans during the boatlift in 1980. After making the decision to grant these and other illegal aliens amnesty, measures had to be taken to ensure that another crisis, requiring another mass amnesty, did not develop. These measures were intended to be applied to all aliens regardless of their race or national origin.

5. DEPARTURE FROM THE NORMAL PROCEDURES

The change in our immigration policy was accompanied by radical departures from the prior procedures in exclusion proceedings. Plaintiffs were subjected to these new procedures but they were not alone. The Court intimates no view on whether these practices in and of themselves constitute a denial of due process but it firmly believes that the manner in which they were applied did not violate Plaintiffs' right to equal protection of the law.[51]

6. INTENT

Determining whether an invidious discriminatory purpose was a motivating factor in Defendants' actions is not an easy task. Such a determination is substantially more difficult to make where, as here, there is no direct evidence of intent to discriminate and the Court is left to decide whether a preponderance of the circumstantial evidence proves intent.

This Court has been struggling with that decision for five weeks. It has examined the exhibits and testimony and has pondered the reasonable inferences that can be drawn therefrom. Having reviewed the record in this cause and being otherwise duly advised, it is the view of the Court that the historical background, the departures from the prior procedures and the apparent disproportionate impact of the detention policy on Haitians do not establish by a preponderance of the evidence that the Defendants intended to discriminate against Plaintiffs because of their race and/or national origin.[52] "The fairness of a law [or policy] does not consist of its effect being actually felt by all alike but in its

50. The Eleventh Circuit's opinion in *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 (11th Cir. 1982) was issued subsequent to this Court's decision in the case at bar but prior to issuance of this opinion. The Court believes that the Eleventh Circuit's analysis of the due process issue is substantially consistent with the reasoning herein. *See* note 54, *infra*.
More importantly, the Court believes that it is significant to note that the Eleventh Circuit's opinion specifically refrained from affirming that part of the district court's opinion which held the Haitians were victims of unlawful discrimination on the basis of national origin. *See Id.* at 1032. This Court believes that the Eleventh Circuit's action in this regard substantially reduced the precedential value and weight to be given to the finding of discrimination. Plaintiffs' argument that INS has a history of discrimination against Haitians was treated accordingly.

51. The Court is specifically referring to immediate service of the I-122, interviews with the aliens prior to their exclusion hearing without counsel being present and mass exclusion hearings.

52. While the Court finds that the detention policy does not violate Plaintiffs' right to equal protection because it was not motivated by any discriminatory purpose, it finds that to the ex-

having been laid down for all alike." [53] The Court is convinced that Defendants intended to be fair and that if another class of aliens arrived in this country in a situation similar to that of the Plaintiffs they would be treated in a similar fashion.[54]

I. CONCLUSION

The worst that can be said of the manner in which INS implemented its new immigration policy is that it was not well planned or executed and consequently it sometimes appeared to be arbitrary or inconsistent. The appearance and allegations of discrimination in the case at bar could have been avoided by promulgation of the new detention rule pursuant to the APA. The APA's notice and comment requirements are not merely technical; rather they are significant requirements designed to assure the quality and responsiveness of agency policymaking:

> congressional immigration policy." *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 at 1037 (11th Cir. 1982).
>
> The second opinion rendered by the United States Supreme Court just this Tuesday, June 15, 1982 held:
>
> *Whatever his status under the immigration laws*, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments. *Shaughnessy v. Mezei*, 345 U.S. 206, 212 [73 S.Ct. 625, 629, 97 L.Ed. 956] (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 [16 S.Ct. 977, 981, 41 L.Ed. 140] (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 [6 S.Ct. 1064, 1070, 30 L.Ed. 220] (1886). Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government. (Emphasis supplied)
>
> *Plyler v. Doe*, — U.S. ——, ——, 102 S.Ct. 2382 at 2391, 72 L.Ed.2d 786 (1982) *citing Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976).
>
> While neither of these opinions squarely address the question of the constitutional protections afforded unadmitted aliens present within the territorial jurisdiction of the United States, they lend support to this Court's conclusion that such aliens are entitled to the protections afforded all persons by the Fifth Amendment provided they are not seeking to invalidate Congressional actions relating to their admission. In other words, the Executive is constrained by the limits of due process when dealing with unadmitted aliens physically present in the United States.
>
> The Court feels these two recent appellate decisions are a natural extension of the prior law regarding the Fifth and Fourteenth Amendment protections due aliens. Although this Court has made the next logical step in this progression, Plaintiffs were unable to establish that Defendants violated the Constitutional guarantees afforded them.

tent the policy withdrew discretion from the District Director to grant deferred inspections to undocumented Haitians arriving aboard non-signatory carriers, it violates due process. *See Petition of Cahill*, 447 F.2d 1343 (2d Cir. 1971). Thus any rule or regulation promulgated pursuant to this opinion must preserve the District Director's power in this regard unless the regulations are amended. *See* 8 C.F.R. § 212.5.

53. Seneca, *Letters to Lucilius*, 107.

Based on the Court's factual finding that Defendants did not discriminate against Plaintiffs within the meaning of the Fifth Amendment, the Court finds Plaintiffs' claims pursuant to Article 3 of the Protocol to be without merit. Similarly, with regard to Plaintiffs' claims under Article 31, the Court finds that they too lack merit. Plaintiffs' detention was not in violation of Section 1 because it was not intended to be a penalty. Detention was imposed as a part of the administrative process pending resolution of Plaintiffs' claims for asylum. To the extent detention was used for its deterrent effect the Court does not believe that its function in this regard should be equated to punishment. Detention was never imposed as a criminal sanction for the means by which Plaintiffs entered this country and is therefore not within Section 1 of Article 31. Moreover, to the extent that it was necessary for efficient administrative processing of Plaintiffs' claims for admission, the detention did not violate Section 2 of Article 31.

Finally, the Court believes that to the extent detention is authorized by statute that the protocol does not give Plaintiffs an independent cause of action for release. The history of adoption of the protocol makes clear that all the individuals involved in adopting it did so with the belief that it would not alter or enlarge the effect of the existing immigration laws. *Ming v. Marks*, 367 F.Supp. 673 (S.D.N.Y. 1973), *aff'd* 505 F.2d 1170 (2d Cir. 1974).

54. Subsequent to the drafting of the equal protection portion of this Court's opinion, two significant appellate court rulings in this area have been issued. The first decision rendered by the Eleventh Circuit Court of Appeals held that "the executive is subject to the constraints of due process in implementing and enforcing

Section 553 was one of Congress' most effective and enduring solutions to the central dilemma it encountered in writing the APA—reconciling the agencies' need to perform effectively with the necessity that "the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure." S.Doc. No. 248, 79th Cong.2d Sess. 244 (1946), *quoting* H.R.Rep. No. 1149, 76th Cong., 1st Sess. 2 (1939). The "principal purpose" of section 553 was "to provide that the legislative functions of administrative agencies shall as far as possible be exercised only upon public participation on notice ...." *Id.* at 257. Congress thus selected public participation in rulemaking as its means of assuring that an agencies' decisions are both informed and responsive. As we have said before, "if the agency in carrying out its 'essentially legislative task', has infused the administrative process with a degree of openness, explanation and participatory democracy required by the APA, it will thereby have 'negate[d] the dangers of arbitrariness and irrationality in the formulation of rules ...'"

American Bus Association v. United States, 627 F.2d 525, 528 (D.C.Cir.1980). The notice and comment provisions "were designed to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969). These provisions afford an opportunity for "the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 744 (3rd Cir. 1969).

[21] These policy reasons for the rulemaking procedure apply with equal force in the field of immigration. It matters not that those regulated are outside the country and cannot reasonably be expected to receive notice and to participate in rulemaking proceedings. That function is performed by the watchdogs of the rights of the regulated. Congress realized that an agency's judgment would only be as good as the information upon which it drew. It prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested—and perhaps best informed—on the subject of the rulemaking at hand. See *Shell Oil v. FEA*, 574 F.2d 512, 516 (Em.App.1978).

Defendants' unilateral formulation and implementation of the new detention policy was contrary to the letter and spirit of the APA. Plaintiffs' reaction to INS' continued enforcement of that policy was not motivated by any desire to circumvent the law. Rather, Plaintiffs' actions were designed to ensure that the Government follows the procedural safeguards that Congress established to protect *all* persons from arbitrary Government action.

> A law is imposed on others by way of a rule and measure. Now a rule or measure is impos .. by being applied to those who are to be ruled and measured by it. Therefore, in order that a law obtain the binding force which is proper to a law, it must be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Therefore promulgation is necessary for the law to obtain its force. Thus ... the definition of law may be gathered; and it is nothing other than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.
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> Aquinas, *Summa Theologica*, I–II, 90, 4

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiffs have established that the new detention policy, whereby excludable aliens are placed in detention until they establish to INS' satisfaction a prima facie claim for admission, was not adopted in accordance with the requirements of the Administrative Procedure Act. Because Defendants failed to give interested persons

notice and an opportunity to comment on the new detention policy and thereafter to promulgate that policy in the Federal Register 30 days prior to its implementation, the Court finds the rule pursuant to which Plaintiffs are incarcerated to be null and void.[58]

By its ruling, the Court does not mean to say that detention in itself is unlawful. That question must be left to another day. The Court holds that when the Government changed its long-standing policy of freely paroling Haitians to a policy of incarcerating them while they litigate their claims for admission to this country, it did so in a procedurally improper way. Those procedures are designed to protect all persons, aliens and citizens alike. Unless and until INS adopts a detention rule or regulation as required by law, this Court will not sanction enforcement of their new detention policy. Accordingly, the Court finds in favor of the Plaintiffs on their Administrative Procedure Act claim as set forth in Count II of the Complaint.

2. Plaintiffs have failed to prove by a preponderance of the evidence that they were incarcerated because of their race and/or national origin. The evidence shows that the detention policy was not directed at Plaintiffs because they were black and/or Haitian, but because they were excludable aliens unable to establish a prima facie claim for admission and that non-Haitians were detained pursuant to this policy as well. The mere fact that more Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminatory. Regardless of its ultimate impact, the policy was intended to be applied and was in fact applied equally to all similarly situated aliens regardless of their race and/or national origin. Accordingly, the Court finds in favor of the Defendants as to Count VII of the Complaint.

3. The parties are hereby directed to appear at a hearing that is set to commence at 2:00 o'clock p. m. on Wednesday, June 23, 1982 for the purpose of determining the effect of this Court's ruling, the remedy to be afforded Plaintiffs, how that remedy is to be effected and the extent to which this Court should retain jurisdiction over this cause. The Court invites participation at said hearing of all other interested parties including but not limited to the State of Florida, Metropolitan Dade County, the Dade County Bar Association, the Florida Bar, the American Bar Association and other organizations that might assist in implementing any proposed plan arising out of said hearing. It is the Court's intent to utilize the assistance of the Committee heretofore appointed by this Court and their attendance is likewise requested.

58. 5 U.S.C. § 552(a); 5 U.S.C. § 552(a)(1)(D); 5 U.S.C. § 553. *Parco v. Morris*, 426 F.Supp. 976 (E.D.Pa.1977).

KEY NUMBER SYSTEM

Lucien LOUIS, et al., Plaintiffs,

v.

Alan C. NELSON, et al., Defendants.

No. 81-1260-CIV-EPS.

United States District Court,
S. D. Florida.

June 29, 1982.

Class action was brought to challenge the Immigration and Naturalization Service's policy of detaining Haitian nationals pending resolution of their claims for admission to the United States. The District Court, Spellman, J., held that the Haitian nationals, who were detained pursuant to a regulation adopted in an invalid rule-making proceeding, were entitled to release on parole pending a determination of their claims for admission.

Judgment accordingly.

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notice and an opportunity to comment on the new detention policy and thereafter to promulgate that policy in the Federal Register 30 days prior to its implementation, the Court finds the rule pursuant to which Plaintiffs are incarcerated to be null and void.[55]

By its ruling, the Court does not mean to say that detention in itself is unlawful. That question must be left to another day. The Court holds that when the Government changed its long-standing policy of freely paroling Haitians to a policy of incarcerating them while they litigate their claims for admission to this country, it did so in a procedurally improper way. Those procedures are designed to protect all persons, aliens and citizens alike. Unless and until INS adopts a detention rule or regulation as required by law, this Court will not sanction enforcement of their new detention policy. Accordingly, the Court finds in favor of the Plaintiffs on their Administrative Procedure Act claim as set forth in Count II of the Complaint.

2. Plaintiffs have failed to prove by a preponderance of the evidence that they were incarcerated because of their race and/or national origin. The evidence shows that the detention policy was not directed at Plaintiffs because they were black and/or Haitian, but because they were excludable aliens unable to establish a prima facie claim for admission and that non-Haitians were detained pursuant to this policy as well. The mere fact that more Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminatory. Regardless of its ultimate impact, the policy was intended to be applied and was in fact applied equally to all similarly situated aliens regardless of their race and/or national origin. Accordingly, the Court finds in favor of the Defendants as to Count VII of the Complaint.

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55. 5 U.S.C. § 552(a); 5 U.S.C. § 552(a)(1)(D); 5 U.S.C. § 553. *Parco v. Morris*, 426 F.Supp. 976 (E.D.Pa.1977).

Lucien LOUIS, et al., Plaintiffs,

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Judgment accordingly.

See also 532 F.Supp. 881, and 544 F.Supp. 1004.

Aliens ⇐53.9

Haitian nationals incarcerated pending resolution of their claims for admission to the United States pursuant to regulation adopted in invalid rule-making proceeding were entitled to release on parole pending determination of their claims for admission.

FINAL JUDGMENT [1]

SPELLMAN, District Judge.

The above-styled cause is a class action brought to challenge the Defendants' policy of detaining Haitian nationals pending resolution of their claims for admission to the United States.[2] The Plaintiffs herein are the Haitian Refugee Center, Inc., Lucien Louis, Wilner Luberisse, Jean Louis Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard, Joel Casimir, Job Dossin and Prophete Talleyvand, on behalf of themselves and all others similarly situated. The class certified by the Court consists of:

> All Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and also are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either:
>
> 1. Unrepresented by counsel; or
>
> 2. Represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.[3]

On June 18, 1982, the Court issued an opinion 544 F.Supp. 973 in this case that found as follows:

1. Plaintiffs have established that the new detention policy, whereby excludable aliens are placed in detention until they establish to INS' satisfaction a prima facie claim for admission, was not adopted in accordance with the requirements of the Administrative Procedure Act. Because Defendants failed to give interested persons notice and an opportunity to comment on the new detention policy in the Federal Register 30 days prior to its implementation, the Court finds the rule pursuant to which Plaintiffs are incarcerated to be null and void.

By its ruling, the Court does not mean to say that detention in itself is unlawful. That question must be left to another day. The Court holds that when the Government changed its long-standing policy of freely paroling Haitians to a policy of incarcerating them while they litigate their claims for admission to this country, it did so in a procedurally improper way. Those procedures are designed to protect all persons, aliens and citizens alike. Unless and until INS adopts a detention rule or regulation as required by law, this Court will not sanction enforcement of their new detention policy. Accordingly, the Court finds in favor of the Plaintiffs on their Administrative Procedure Act claim as set forth in Count II of the Complaint.

2. Plaintiffs have failed to prove by a preponderance of the evidence that they

1. This Final Judgment is being entered pursuant to the provisions of Federal Rules of Civil Procedure 23(c)(3), 54 and 58.

2. The complaint in this cause originally contained seven counts challenging a wide variety of policies and practices used by INS during exclusion proceedings. In a prior order of this Court, four entire counts and portions of two others were dismissed. *See Louis v. Meissner*, 532 F.Supp. 881 (S.D.Fla.1982).

Two issues set forth in three counts survived the Court's Order of Dismissal. The first issue, and a question of primary importance to these Plaintiffs, is whether they are lawfully being detained pending the outcome of their exclusion proceedings. As will be more fully explained *infra*, the Court has found in favor of the Plaintiffs on this issue based on their APA claim (Count II) and in favor of the Defendants on the discrimination claim (Count VII). In light of the relief to be afforded Plaintiffs by this Final Judgment, the Court believes that Plaintiffs' claim of a right of access, as set forth in Count IV of the Complaint, is moot.

3. See Paragraph 6 *infra*. The modification granted therein is without prejudice to the right of the Government to object to further class modifications or motions for intervention.

were incarcerated because of their race and/or national origin. The evidence shows that the detention policy was not directed at Plaintiffs because they were black and/or Haitian, but because they were excludable aliens unable to establish a prima facie claim for admission and that non-Haitians were detained pursuant to this policy as well. The mere fact that more Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminatory. Regardless of its ultimate impact, the policy was intended to be applied and was in fact applied equally to all similarly situated aliens regardless of their race and/or national origin. Accordingly, the Court finds in favor of the Defendants as to Count VII of the Complaint.

Based on this ruling, the Court set a hearing for June 23, 1982 to determine "the effect of this Court's ruling, the remedy to be afforded Plaintiffs, how that remedy should be effected and the extent to which this Court should retain jurisdiction over the cause."

The Court has found that the detention policy pursuant to which Plaintiffs are incarcerated was adopted and implemented "without observance of the procedures required by law." Therefore, the new detention policy is null and void and the policy regarding parole, that was used prior to May 20, 1981, is in full force and effect. *See* 5 U.S.C. §§ 552, 553, and 706; *Kelly v. United States*, 339 F.Supp. 1095, 1101 (E.D. Cal.1972); *Lewis v. Weinberger*, 415 F.Supp. 652 (D.N.M.1972); *Hou Ching Chow v. Attorney General*, 362 F.Supp. 1288 (D.C.D.C.1973); *Parco v. Morris*, 426 F.Supp. 976 (E.D.Pa.1977); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2nd Cir. 1972).

The Court does not believe that allowing these Plaintiffs to remain in detention while a rulemaking proceeding takes place is a viable solution to this lawsuit. Some of the Plaintiffs herein have been incarcerated for over one year pursuant to a policy this Court has found to be unlawful. Nothing in the record indicates that these individuals fall within the old detention policy because they are likely to abscond or a security risk. It would not be just or equitable to require detention of the members of this class in the future nor would an unconditional release be appropriate under the circumstances. Therefore, the Court believes that the remedy that best serves the interests of all parties to this litigation is an interim plan for release of these Plaintiffs on parole subject to the conditions set forth herein pending a determination of their claims for admission.

It is therefore,

ORDERED AND ADJUDGED as follows:

1. FINAL JUDGMENT is entered in favor of the Defendants as to Count VII of the Complaint.

2. FINAL JUDGMENT is entered in favor of the Plaintiffs as to Count II of the Complaint.

3. Based on the power vested in this Court pursuant to 28 U.S.C. § 2202,[4] the Defendants herein, their heirs, successors, assignees, agents and employees are hereby ENJOINED from enforcing their policy of detaining excludable aliens unless they establish to INS' satisfaction a prima facie claim for admission until that policy is embodied in a rule and adopted in accordance with 5 U.S.C. §§ 552 and 553 and any other relevant provision of law. However, this injunction shall not be construed to preclude detention of excludable aliens deemed a security risk or likely to abscond.

4. Based on the power vested in this Court pursuant to 28 U.S.C. §§ 2202 and 2241, the Defendants herein, their heirs, successors, assignees, agents and employees are hereby ENJOINED from continuing to detain the Plaintiffs herein and are ORDERED to release said individuals.

4. *United States Lines Co. v. Shaughnessy*, 195 F.2d 385 (2nd Cir. 1952), citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951); *Powell v. McCormick*, 395 U.S. 486, 499, 89 S.Ct. 1944, 1952, 23 L.Ed.2d 491 (1969).

5. The implementation of Paragraph 4 of this Final Judgment is to be commenced forthwith in accordance with the terms and conditions hereinafter set forth:

A. The Immigration and Naturalization Service is to obtain full identification information relative to each member of the class including but not limited to photographs, fingerprints and a full and complete personal history for future and continued identification of said individuals. This record is to be kept by the Service in duplicate form and to be utilized by them in the location that the alien is ultimately resettled. INS shall also maintain a master file of these records in their offices in Miami, Florida. Said central file is to be kept separate and apart from other records for easy future identification and use. These records shall contain continual updating of the original location of said individual and any notice of a change relative to address and employment.

B. Each Haitian is to receive a typed immigration form I-94 with alien number, an indication of parole pursuant to Section 212(D)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(D)(5), and with "employment authorized" stamped on said form. A duplicate of said I-94 shall be kept in the central file located here in Miami, Florida in addition to being kept in the alien's file.

C. The release of the members of the class will be completed regardless of whether counsel has been secured or otherwise provided for said individuals at the time of their release.

D. The members of the class are to be released to INS approved sponsors throughout the United States upon presentation to INS of responsible sponsors who are willing and agreeable to accepting the terms and conditions of this Order as the same apply to them. Responsible sponsors shall always include volunteer agencies and may include extended family members (residents in a de facto sense who can satisfy the Service relative to their permanent and definable addresses) or other suitable parties approved by the volunteer agencies. There must be *both* a volunteer agency and an individual sponsor as to each alien. It is not the intent of this Court by this Order that the Service will deviate from the policy which precludes the release of individuals who have serious, contagious diseases or who have been medically declared to be mentally psychotic and a danger to themselves or the community. Financial assistance to defray medical and psychiatric expenses and to assist those Plaintiffs who are now and remain in the future financially indigent is a concern that must be continued to be addressed. Numerous voluntary agencies have indicated their willingness in this regard. It is not the Court's intent that this financial obligation be the continued concern of the State or the community in which the individual is located.

E. As a condition to approval as a sponsor, each voluntary agency and individual sponsors as contemplated by this Order will agree in writing to abide by the terms of this Order including a full reporting procedure on a weekly basis to independent third parties approved and appointed by this Court. The Defendants within ten (10) days from the entry of this Order are to provide arrangements for financial funding to defray the expense and functioning of said independent third parties. The independent third parties appointed by this Court are to immediately communicate to the appropriate INS representative the failure of any sponsor to report or any negative reports relative to individual Haitians, that is to say, an indication from the sponsor that the Haitian failed to contact him. The reporting conditions, requirements and responsibilities set forth in this Paragraph are pursuant to and under the authority of the United States District Court.

F. This Court's predecessor issued an injunction enjoining exclusionary hearings from going forward as to all Haitians in detention who were unrepresented by counsel. Subsequent to this Court's opinion of June 18, 1982, the Defendants moved to dissolve that injunction. This Court does herewith specifically reserve ruling on said motion at this time in accordance with the following terms and conditions:

(1) Hearings are to begin as soon as possible for all members of the class who are represented by counsel whether they be privately retained or pro bono.

(2) At or before the time of release, each member of the class together with the voluntary agency and individual sponsor are to be served with notice of the first appearance before an Immigration Judge which appearance is to be not less than thirty (30) days after the date of release. At the time of said first appearance, if said individual has either privately retained counsel or accepted pro bono representation, the individual, together with the voluntary agency and individual sponsor and counsel who at that time will be required to file a G–28 form, will be notified and the matter will proceed thereafter in accordance with law.

(3) If the individual has neither secured counsel or in lieu thereof has pro bono counsel assigned to him at the time of his first appearance, said matter shall be reset for his second appearance not less than thirty (30) days thereafter.

(4) At the second appearance if private counsel has been retained, said cause shall proceed as contemplated in the preceding paragraph. In the event the individual has not secured private counsel, pro bono counsel will be assigned to represent said individual provided, however, that if said individual with a full understanding of his right to have said pro bono counsel assigned to him declines said representation, said refusal to accept such pro bono representation shall serve as good cause for said hearing, as it pertains to said individual, proceeding in accordance with law.

(5) It is the intent of this Order that each individual has the right, after being fully advised of his right to secure private counsel or have assigned pro bono representation, to freely and voluntarily waive said rights provided that the same is done under oath before the Immigration Judge and that said individual is informed of and determined that he understands his rights to privately retained counsel or have pro bono counsel assigned to represent him and said Immigration Judge should further determine that any decision to give up such right is voluntary and not the result of any force, threats or promises. It is further understood that if the individual member of the class appears at the first appearance without counsel and does not knowingly, intelligently and voluntarily waive his right to counsel, that he will be entitled to the continuance of not less than thirty (30) days contemplated for the second appearance.

The Court is specifically continuing to reserve on the Government's motion to vacate the injunction relative to the proceeding of exclusionary hearings regardless of representation of counsel as a direct result of the appearance before this Court of representatives of the American Bar Association, the national and local chapters of the American Immigration Lawyers' Association, the Lawyers' Committee for International Human Rights and the Dade County Bar Association. It is the view of this Court that based on the specific representations made by these organizations and on the additional representations of several of the voluntary agencies that likewise appeared before this Court indicating their ability to obtain attorneys for unrepresented Haitians, that the effort to secure pro bono representation for all of the individual members of the class desiring the same should be attempted. It is the further view of the Court that the representation of Plaintiffs' counsel to this Court of assisting in coordination of this effort should be honored by this Court in the hope of its ultimate success.[5] It is the intent of this Court, therefore, that the injunction heretofore issued by the predecessor Judge will remain in effect regardless of whether or not Plaintiffs are in detention until ninety (90) days after the entry of this Final Judgment at which time the same will be dissolved.

5. Private or pro bono counsel accepting responsibility of representing class members must do so with the understanding and realization that by undertaking that responsibility they are impliedly representing that they are capable of presenting the alien's claim for admission within a reasonable period of time as contemplated by this Order.

G. Release of the individual members of this class is ORDERED for the full period of legal process and that entry of an order of exclusion in and of itself will not be a ground to revoke said parole. An inexcusable failure to personally appear for proceedings before the Immigration and Naturalization Service or any other proceeding in which the attendance of the individual is required or an inexcusable failure to report on a weekly basis resulting in a negative report to INS as set forth above, will be grounds for parole revocation. All other grounds heretofore existing under existing law will likewise serve as a ground for parole revocation.[6]

H. The voluntary agencies participating in this program will, to the extent possible, locate members outside of Dade County and the State of Florida while taking into consideration the Dade County pro bono program, the availability of other counsel and individual sponsors related to said aliens.

6. The motion of the Haitian Refugee Center, Inc. to enlarge the class to include all Haitians in detention for whom a G–28 has been filed on behalf of said Plaintiffs be and the same is hereby GRANTED with the understanding and representation of counsel for the Plaintiffs that privately retained or pro bono counsel will be secured so as to afford fair representation of said individuals to be heard within the reasonable period contemplated by this Order, said individuals be and they are hereby included within said class and are bound by the full effects of this Court's opinion of June 18, 1982 and the provisions of this Final Judgment.

7. That this Court does herewith vacate any interlocutory orders entered by this Court or by the predecessor Judge and does herewith specifically relinquish jurisdiction over the members of said class to the extent that the same is not hereafter specifically retained by this Court.[7]

8. That this Court does herewith specifically retain jurisdiction over the parties and the subject matter on (a) Defendants' motion to vacate this Court's Order enjoining the exclusionary hearings relative to members of the class who are not represented by either private or pro bono counsel; (b) this Court's Order of February 8, 1982 as the same pertains to the pro bono program of the Dade County Bar Association; (c) Plaintiffs' motion ordering the granting of relief to individual members of the class who have heretofore escaped from detention to be entitled to the benefits of this Court's opinion of June 18, 1982 and this Court's Final Judgment; (d) enforcement of the terms and conditions of this Final Judgment; and (e) the Plaintiffs' motion for award of attorneys' fees and all costs with the understanding that this retention of jurisdiction as to that issue is not a determination of the merits of the entitlement of the Plaintiffs to either attorneys' fees or costs.[8,9]

6. This Order shall not be construed to remove from the District Director the power granted to him by the regulations to, in his discretion, revoke the parole of any of the Plaintiffs herein. Hopefully, the District Director's power in this regard will be sparingly, judiciously and reasonably exercised. To the extent it is so exercised, the Court retains jurisdiction to review said revocation with regard to these class members and, if necessary, to appoint Special Masters in various locations throughout the United States to conduct such a review based on fact finding authority and to report to the Court.

7. By this ruling, the Court intends to relieve itself of jurisdiction over all exclusion hearings involving class members that go forward outside of this District. The individual aliens should seek such administrative or judicial relief as is available to them by statute in the appropriate INS office or federal district court. It is not the Court's intent to vacate any Orders heretofore entered either granting or denying motions to dismiss.

8. As to the members of the class in detention as of the date of this Order, it is ordered that their parole status will be governed by this Final Judgment and not by any subsequent rule hereafter adopted.

9. To the extent that this Court does herewith reserve jurisdiction on the ore tenus motions for reconsideration of this Court's Order of Dismissal and for motions to amend the class to include individuals heretofore represented by counsel, this is a partial Final Judgment, said issues to be dealt with by a supplemental order and to the extent that paragraphs 7 and 8 hereof require the same, the Court does in fact

390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968). Inadvertent does not mean unexpected. An "inadvertent" discovery occurs when an officer does not have probable cause to believe that he will find a specific item at a particular place until he actually sees it. *United States v. Hare*, 589 F.2d 1291 (6th Cir. 1979). *See also United States v. Bolts*, 558 F.2d 316 (5th Cir.), *cert. denied*, 439 U.S. 898, 99 S.Ct. 262, 58 L.Ed.2d 246 (1978).

[5] The agents were lawfully in Bustamante's hotel room effecting a valid arrest. Further, they had a right to be there as conducting a search incident to a lawful arrest for weapons or evidence within the arrestee's control. Although the agents believed the cocaine to be in the room, they believed it to be in the yellow flight bag. Thus, Agent Stewart's discovery of the cocaine was inadvertent under *United States v. Hare, supra*. When he glanced down into the slightly open drawer, Agent Stewart immediately recognized what he thought was the packaged contraband which Agent Modesitt had described to him earlier. Since the agents knew the cocaine was contained in bags and did not have to search the bags to discover their contents, the Court finds this fact situation is not controlled by *Robbins v. United States*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981). Agent Modesitt discovered the contents of the packages when he was lawfully in Room 535 in his earlier meeting with Gravier and Bustamante and conveyed this information to Agent Stewart. Thus, even though the cocaine was concealed in opaque bags, the Court finds that it was immediately recognizable as evidence and thus in plain view. *See United States v. Ortiz*, 603 F.2d 76 (9th Cir. 1979); *United States v. Johnson*, 561 F.2d 832 (D.C.Cir.1977), *cert. denied*, 432 U.S. 907, 97 S.Ct. 2953, 53 L.Ed.2d 1080 (1978); *United States v. Welsh*, 446 F.2d 220 (10th Cir. 1971). Likewise, since the agents had probable cause to believe that the white powder contained in the bags was cocaine, the fact that the substance was not conclusively proven to be cocaine until subjected to laboratory tests did not make the incriminating nature of the packages less obvious. *United States v. Rodriguez*, 596 F.2d 169, 175 (6th Cir. 1979).

Therefore, this Court finds that the cocaine which was found by the agents in Room 535 is admissible in evidence, its discovery falling within either the scope of a search incident to a lawful arrest or the scope of the plain view exception to the warrant requirement. *Chimel v. California, supra; Coolidge v. New Hampshire, supra*. Accordingly, defendants' motion to suppress the evidence seized is without merit and is denied.

SO ORDERED.



Lucien LOUIS, Jean Louis, Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard and Joel Casimir, on behalf of themselves and all others similarly situated; and the Haitian Refugee Center, Inc., a non-profit membership corporation, on behalf of itself and its members, Plaintiffs,

v.

Doris MEISSNER, Acting Commissioner, Immigration and Naturalization Service; Joe Howerton, District Director, Immigration and Naturalization Service, District VI; Lee Rowland, Assistant District Director for Deportation, Immigration and Naturalization Service, District VI; Fred Alexander, Officer in Charge, Krome Avenue North Detention Facility; the Immigration and Naturalization Service; William French Smith, Attorney General of the United States, Defendants.

No. 81-1260-CIV-EPS.

United States District Court,
S. D. Florida,
Miami Division.

Feb. 24, 1982.

Refugees brought petition for writ of habeas corpus and complaint for declarato-

ry, injunctive and mandatory class action relief challenging policies and procedures to be used by the Immigration and Naturalization Service in exclusion proceedings. On defendants' motion to dismiss, the District Court, Spellman, J., held that: (1) under statute providing that habeas corpus is sole and exclusive procedure for judicial review of final orders of exclusion, federal district court lacked subject matter jurisdiction over complaint of refugees challenging policies and procedures to be used during exclusion proceedings where refugees had not exhausted their administrative remedies and had brought suit in absence of final order of exclusion, and (2) refugees lacked standing to complain of policies and procedures to be used during exclusion proceedings where no causal relationship was established between putatively illegal conduct of Immigration and Naturalization Service and injury, and there was no showing that policies and procedures complained of would continue to be used, that use of those procedures would result in entry of final orders of exclusion, that administrative process would not cure alleged defects, or that favorable decision on merits was likely to redress injury since no final orders of exclusion had been entered.

Motion granted in part.

1. Statutes ⇐181(1)

Cardinal principle of statutory construction is to give effect to intent of Congress.

2. Statutes ⇐217.4

Where intent of Congress is not clear from language of statute itself and court is faced with two possible interpretations of statute, it is appropriate to rely on legislative history to ascertain that intent.

3. Habeas Corpus ⇐23

Under statute providing that habeas corpus is sole and exclusive procedure for judicial review of final orders of exclusion, federal district court lacked subject matter jurisdiction over complaint of refugees challenging policies and procedures to be used during exclusion proceedings where refugees had not exhausted their administrative remedies and had brought suit in absence of final order of exclusion. Immigration and Nationality Act, § 106, 8 U.S.C.A. § 1105a.

4. Federal Civil Procedure ⇐103

Standing requires at irreducible minimum party who invokes court's authority to show that he personally has suffered some actual or threatened injury as a result of putatively illegal conduct of defendant and that injury is likely to be redressed by favorable decision.

5. Aliens ⇐54.3(1)

Refugees lacked standing to complain of policies and procedures to be used during exclusion proceedings where no causal relationship was established between putatively illegal conduct of Immigration and Naturalization Service and injury, and there was no showing that policies and procedures complained of would continue to be used, that use of those procedures would result in entry of final orders of exclusion, that administrative process would not cure alleged defects, or that favorable decision on merits was likely to redress injury since no final orders of exclusion had been entered.

6. Statutes ⇐189

If literal construction of words of statute would lead to absurd result, statute must be construed so as to avoid that result.

7. Federal Courts ⇐12

Omission or ambiguity in statute cannot be construed to allow adjudication of nonjusticiable controversy.

Ira J. Kurzban, Vera Weisz, Miami, Fla., Bruce J. Winick, Irwin P. Stotzky, Coral Gables, Fla., Michael Rosen, Miami, Fla., for plaintiffs.

Thomas Moseley, Miami, Fla., Robert L. Bombaugh, Washington, D. C., for defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS IN PART

SPELLMAN, District Judge.

THIS CAUSE came before the Court on Defendants' Motion to Dismiss. Having re-

viewed the record in this cause and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is GRANTED in part as follows:

PROCEDURAL BACKGROUND

Originally this case was instituted on June 10, 1981 as a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2241.[1] The Petitioners named therein were "Marie Lucie Jean and Harold Jacques, on behalf of themselves and other Haitian aliens similarly situated, and the Haitian Refugee Center, Inc." The Petition was filed in order to "stay final orders of exclusion and deportation against certain Haitian refugees issued by the Immigration and Naturalization Service" (hereinafter INS). These "final orders" were allegedly obtained in violation of Petitioners' rights to "a fair exclusionary hearing and to fair proceedings, and to consult with counsel."

On June 16, 1981 an amended petition for a writ of habeas corpus and a complaint for declaratory, injunctive and mandatory class action relief were filed.[2] Seven causes of action were asserted therein: (1) that the Defendant officials of INS District VI and their employees conducted preliminary interviews with Petitioners and Plaintiffs in which the refugees were compelled to appear in person before INS representatives without being permitted to be accompanied, represented, and advised by counsel, and without being advised of their right to do so, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 555(b); (2) that on or about May 20, 1981, Defendants changed their prior policy with respect to the parole and detention of Haitian refugees arriving after that date, the order in which such refugees would be subjected to exclusion proceedings, and the manner in which such proceedings would be conducted, a change in policy which is unlawful since not accomplished in accordance with the rulemaking requirements of the APA, 5 U.S.C. § 553; (3) that Defendants failed to provide Petitioners with adequate notice of their right to counsel at exclusion hearings and of their right to a hearing on which they would have a reasonable opportunity to present evidence, to examine and object to evidence, and to cross-examine witnesses against them, failed to give Petitioners written notice of the purposes for their detention and hearing, and on information and belief, threaten not to provide such notice to plaintiffs when and as they are subjected to exclusion proceedings, all in violation of INS Operations Instructions, 8 C.F.R. § 235.6(a) (1981), Section 292 of the Immigration and Nationality Act, 8 U.S.C. § 1362, the Due Process Clause of the Fifth Amendment, and the United Nations Convention and Protocol Relating to the Status of Refugees ("Protocol"); (4) that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, access to counsel in connection with their exclusion proceedings, in violation of INS Operations Instructions and Regulations, 8 C.F.R. § 236.2(b) (1981), Section 292, of the Immigration and Nationality Act, 8 U.S.C. § 1362, the Due Process Clause of the Fifth Amendment, the First Amendment, and the Protocol, and in violation of Plaintiff HAITIAN REFUGEE CENTER, INC.'s rights under the First Amendment; (5) that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, their right to a public exclusion hearing, in violation of INS Operations Instruc-

1. This cause was originally assigned to Judge Hastings and was not transferred to this Division until December 3, 1981.

   A review of the original Petition reveals that it was defective on its face and should have been dismissed for failure to comply with the provisions of 8 U.S.C. § 1105a(b).

2. On June 12, 1981, during a hearing before Judge Hastings, Petitioners announced their intent to file an amended Petition to include all Haitians in exclusion proceedings. On June 16, 1981, an amended Petition for a Writ of Habeas Corpus was filed, along with the original complaint for declaratory, injunctive and mandatory relief-class action.

   The Court formally sanctioned the filing of the amended petition and complaint when it denied Defendants' motion to have parties dropped and claims severed in the complaint. *See Order*, dated July 6, 1981, docket no. 28.

tions and Regulations, 8 C.F.R. § 236.2(a) (1981), the Due Process Clause of the Fifth Amendment and the Protocol, or in the alternative, that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, their right to a private hearing under said regulation; (6) that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, their right to apply for political asylum in violation of INS Operations Instructions and Regulations, 8 C.F.R. § 236.-2(a) (1981), Section 208 of the Immigration Act, 8 U.S.C. § 1158, and the Protocol, and denied Petitioners and on information and belief threaten to deny Plaintiffs their right to notice of their right to seek political asylum in violation of the Protocol, the Due Process Clause of the Fifth Amendment, 8 C.F.R. § 208.1 *et seq.*, 8 C.F.R. § 236.3, Section 208 of the Immigration Act, 8 U.S.C. § 1158, INS Operations Instructions, and (7) that Defendants have applied a double standard regarding the exclusion of aliens, subjecting Haitian refugees but no other refugee groups to the above policies and procedures, resulting in discrimination and threatened discrimination based on race and national origin in violation of the Equal Protection requirements of the Due Process Clause of the Fifth Amendment and the Protocol.

An Amended Complaint was filed on August 24, 1981. In addition to deleting two parties named in the First Amended Petition/Complaint, and adding six new Plaintiffs, it was alleged that: "On or about August 10, 1981, this Court granted defendants' Motion to Vacate petitioners' final orders of exclusion and to remand to the Immigration and Naturalization Service.[3] As a result, the class designated as 'petitioners' in the Complaint, and defined as refugees for whom final orders of exclusion and deportation have been issued is non-existent and has been absorbed into the class designated as 'plaintiffs' in the complaint, and defined as refugees who have not yet been issued final orders of exclusion and deportation: As a result allegations in the Complaint concerning petitioners should not refer exclusively to plaintiffs."[4]

On September 30, 1981, the Court granted Plaintiffs' motions for class certification and for a preliminary injunction.[5] The class of Plaintiffs before the Court is defined as follows:

> The Class consists of all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either: (1) unrepresented by counsel; or (2) represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.[6]

3. *See Order*, dated August 10, 1981, *nunc pro tunc* to July 10, 1981, docket no. 38.

4. On February 1, 1982, the Court orally ordered Plaintiffs to file an amended complaint within ten days in order to resolve certain ambiguities that were created when the first amendment to the complaint was filed on August 24, 1981. As of February 18, 1982, the second amended complaint has not been filed as ordered. Therefore, the Court is ruling on the motion to dismiss based on the allegations contained in the original complaint filed June 16, 1981, docket no. 6, and the amendment thereto, filed August 24, 1981, docket no. 50.

5. The Class was certified and the injunction issued prior to the transfer of this cause to the undersigned Judge.

6. The orders certifying the class and enjoining the Defendants from holding exclusion hearings were modified by this Court based on legal and factual developments that occurred subsequent to the entry of said orders. In particular, at the time of the transfer, there were motions pending for the decertification and clarification of the class certified by Judge Hastings. In addition, subsequent to the transfer, the Dade County Bar Association has made a significant and historic effort to obtain attorneys to represent indigent Haitian nationals, many of whom have been incarcerated at the Krome Detention Facility for over six months. In a matter of weeks, the Dade County Bar Association has been successful in obtaining over three hundred lawyers to represent the indigent Haitians so that their hearings may proceed and they may obtain some form of resolution of

The injunction permits the Defendants to proceed with exclusion hearings for those class members delineated in "(2)" of the definition but it prohibits entry of a final, non-appealable order of exclusion against them without prior notice being given to the Court. As to all other class members, the Defendants are enjoined from holding any exclusion proceedings until their claims are resolved.

SECTION 106 OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1105a PRECLUDES JUDICIAL REVIEW OF COUNTS I, III, V AND VI IN THEIR ENTIRETY AND COUNTS IV AND VII IN PART

United States District Courts are tribunals of limited jurisdiction; their power to hear a case is dependent upon congressional implementation of one of the Constitution's grants of subject matter jurisdiction. As a result, it is imperative that the applicable statutory requirements relating to subject matter jurisdiction be satisfied before the Court proceeds to adjudicate the controversy.

The relevant statutory authority in the case at bar is Section 106 of the Immigration and Nationality Act, (hereinafter INA), 8 U.S.C. § 1105a. That section provides in part:

> (b) *Notwithstanding the provisions of any other law*, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings *and not otherwise*.
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration law and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order. (Emphasis added)

Defendants' motion to dismiss concentrates its challenge on this Court's power to hear the claims delineated in the complaint. In the absence of a final order of exclusion, and exhaustion of administrative remedies, Defendants contend that the Court is divested of subject matter jurisdiction.[7] On the other hand, Plaintiffs believe that the

their asylum claims to remain in the United States.

The class in this case, prior to the modification order, was defined as only Haitians who were unrepresented. To leave the class in that status would have placed the Haitians in detention in the situation of choosing between having counsel or having the protection of this Court's injunction, and any relief that may ultimately be obtained from this lawsuit. Therefore, the Court modified the class to include Haitians represented through the Dade County Bar's project and, should similar projects be initiated in other areas where class members are detained, similar modifications would, in all likelihood, be forthcoming.

Simultaneously with the class modification, the Court modified the injunction to allow class members represented by counsel provided through the Dade County Bar's project to begin their exclusion hearings. However, the Court required the Defendants to provide notice to the Court prior to the entry of a final, nonappealable order of exclusion. *See Order Denying Decertification and Granting Modification of the Class and Preliminary Injunction*, dated February 9, 1982, docket no. 288.

7. Defendants' motion to dismiss does not assert that Section 1105a(b) bars the claim set forth in Count II. Rather, they base their jurisdictional challenge to that Count on the "political question" doctrine. *See Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The Court declines to rule on that question at this time.

Court has jurisdiction regardless of the fact that final orders of exclusion have not been entered against them and they have not exhausted their administrative remedies. The essence of their argument is as follows:

> The terms of the statute, its legislative history and the cases defendants cite demonstrate that Congress in 8 U.S.C. § 1105a(b) only intended to limit the method of review to habeas corpus for *final* orders *after* they had been made or to determinations made *during* or *incident to* exclusion proceedings, not the separate or preliminary matters which comprise the essence of the claims asserted by Plaintiffs.

Plaintiffs' Memorandum in Opposition to the Motion to Dismiss, filed October 30, 1981, docket no. 146, at 24.

The resolution of these conflicting interpretations of Section 1105a must begin with the language of the statute itself. *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980); *Ernst & Ernst v. Hochfedler*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979); *Watt v. Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). The statute provides that habeas corpus is the sole and exclusive procedure for the judicial review of final orders of exclusion. However, it does not explicitly preclude judicial review of procedures utilized in exclusion proceedings prior to the entry of a final order. In this respect, the provisions of Section 1105a(b) are ambiguous and unclear.

[1, 2] The cardinal principle of statutory construction is to give effect to the intent of Congress. *Watt v. Alaska, supra; Sinclair Refining v. Atkinson*, 370 U.S. 195, 215, 82 S.Ct. 1328, 1339, 8 L.Ed.2d 440 (1962); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980). When the intent of Congress is not clear from the language of the statute itself and the Court is faced with two possible interpretations of the statute, it is appropriate to rely on the legislative history to ascertain that intent. *Rogers v. Frito-Lay, Inc., supra; United States v. Noe*, 634 F.2d 860 (5th Cir. 1981); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976). A brief examination of the background to 8 U.S.C. § 1105a(b) indicates that Congress did not intend what Plaintiffs urge this Court to believe.

Until 1955, deportation and exclusion orders could only be reviewed by a writ of habeas corpus. Thus, in order to obtain judicial review of a deportation order, the alien had to be in custody. In 1955, the Supreme Court held that the judicial review provisions of the APA permitted an alien to obtain judicial review of a deportation order by an action for declaratory judgment. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955). The following year the Supreme Court held that an alien could also secure judicial review of an exclusion order by resort to the APA. *Brownell v. We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225 (1956).

In response to these developments, Congress, in 1961, enacted 8 U.S.C. § 1105a in order to overrule the *Shung* case and to prevent the abuses of the judicial system by which an alien could challenge his exclusion or deportation in successive lawsuits. H.Rep.No.1086, 87th Cong. 1st Sess., *reprinted in* [1961] 2 U.S.Code Cong. & Ad. News 2950, 2969, 2974. Section 1105a was intended to be the "single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States . . ." *Id.* at 2966. It was enacted because "habeas corpus is a far more expeditious judicial remedy than that of declaratory judgment" and because "[t]here is no validity or sound legal basis for any procedure which permits an excluded alien to extend his presence in the United States for 7 years while his eligibility to enter this country is being disputed in the courts." (as occurred in *Shung*). *Id.* at 2977.

Congress' intent in enacting Section 1105a was to end the seemingly endless procedural delays that allowed an excludable or deportable alien to prolong his departure from this country. *Foti v. Immigra-*

tion and Naturalization Service, 375 U.S. 217, 226, 84 S.Ct. 306, 312, 11 L.Ed.2d 281 (1963). The means to effect the purpose of the statute was to codify the sole and exclusive procedure for challenging the exclusion and deportation process. *Cheng Fan Kwok v. Immigration and Naturalization Service*, 392 U.S. 206, 214, 88 S.Ct. 1970, 1975, 20 L.Ed.2d 1037 (1967).

It is inconceivable to believe that Congress would legislate against the delays that can follow the entry of a final order of exclusion without intending to cut off similar dilatory practices that might be utilized prior to the entry of an order. If such an interpretation is not abundantly clear, as this Court believes it is, from the language and statutory history of the statute, it becomes so when one analyzes the policy reasons for the statute's jurisdictional requirements. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966); *United States v. American Trucking Associations*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975); *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980).

A basic principle of law, codified by the statute, is that courts will review only final orders. Interlocutory orders cannot and should not be reviewed because such a procedure would encourage procedural attacks which would confuse the administrative proceedings and substantially increase the burdens on this Court.

The requirement of finality is closely linked to the doctrine that administrative remedies must be exhausted, and it serves the same purpose.

> A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals. Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise. * * * [J]udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that the frequent and deliberate flouting of administrative process could weaken the effectiveness of an agency by encouraging people to ignore its procedures.
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> *McKart v. United States*, 395 U.S. 185, 194–5, 89 S.Ct. 1657, 1662–63, 23 L.Ed.2d 194 (1969); *Myers v. Bethlehem Shipbuilding*

Corp., 308 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408 (1938).

[3] The statute's "finality" and "exhaustion" requirements are consistent with this Court's conclusion that Congress intended Section 1105a to restrict, not expand, judicial relief for aliens. See *See Cheng Fan Kwok v. Immigration and Naturalization Service*, 392 U.S. 206, 88 S.Ct. 1970, 20 L.Ed.2d 1037 (1967); *Cobb v. Murrell*, 386 F.2d 947, 951 (5th Cir. 1967); *Marcello v. Dist. Dir. of Immigration*, 634 F.2d 964, 965 (5th Cir. 1981). Interpreting the statute to allow Plaintiffs to challenge "separate or preliminary matters" without complying with the statute's requirements would be antithetical to Congress' intent when enacting Section 1105a. Such an interpretation is impermissible when, as here, Congress' intent is clear. *Sinclair Refining Co. v. Atkinson, supra; United States v. Second Nat'l. Bank of North Miami*, 502 F.2d 535 (5th Cir. 1974) *cert. denied*, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1974); *Saxon v. Georgia Ass'n. of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968).

Therefore, the Court holds that Plaintiffs may only seek judicial review of the policies and procedures that are used during and incident to their exclusion proceedings by habeas corpus and only after meeting the jurisdictional requirements of Section 1105a.[8]

TOTAL DISMISSAL NOT WARRANTED

This conclusion does not mandate dismissal of the entire complaint. The Court is of the view that it is without subject matter jurisdiction to hear only those portions of Counts I and III through VII that would "merge" into a final order of exclusion. "Merge" refers to any practice, policy or procedure that is used during or incident to the exclusion proceeding which is reviewable on appeal to the Board of Immigration Appeals (hereinafter "BIA") or which may be reviewed in habeas corpus proceedings in the district court. *See* 8 U.S.C. § 1226(b); 8 C.F.R. §§ 3.1, 236.7; C. Gordon & H. Rosenfeld, Immigration Law and Procedure § 1.10; *Foti v. Immigration and Naturalization Service, supra*, 375 U.S. at 229, 84 S.Ct. at 314; *Cheng Fan Kwok v. Immigration and Naturalization Service, supra*, 392 U.S. at 211, 216, 88 S.Ct. at 1973, 1976; *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980).[9] The Court finds that the following Counts, or portions thereof, would merge into any final order of exclusion that may be entered and that the Court is without subject matter jurisdiction to hear them at this time:

1. As alleged, Count I is DISMISSED in its entirety. *If* an alien has a *right* to be represented by counsel during an interview with an INS representative, and *if* a statement is taken from him in derogation of that right, which is used in subsequent proceedings and results in the entry of a final order of exclusion, that practice or procedure is reviewable on appeal to the BIA and in habeas proceedings.[10]

8. There are no allegations in the complaint that the remedies provided by the statute and regulations are inadequate or ineffective. *See, e.g., NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968); *Walker v. Southern Railway*, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294 (1966), and the Court does not find this to be a case that falls into one of the exceptions to the exhaustion doctrine. *See Patsy v. Florida International University*, 634 F.2d 900 (5th Cir. 1981) (en banc). This is true especially in light of the absence of any final orders.

9. All of the Counts hereafter dismissed challenge procedures or practices that would be encompassed by a final order of exclusion. *See Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442, 458 (S.D.Fla.1980). The allegations of said Counts do not seek review of discretionary relief collateral to exclusion proceedings as permitted by *Foti* and *Cheng, supra*. The Court has retained jurisdiction over those portions of the complaint that seek review of discretionary acts.

10. The Court intimates no views on whether such interviews constitute primary or deferred inspection or whether they fall within the provisions of 8 C.F.R. § 292.5(b). To the extent that information obtained in said interviews is used to impeach the alien, *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64

2. As alleged, Count III is DISMISSED in its entirety. To the extent that any alleged failure to give an alien notice of the nature of his exclusion hearing results in the entry of a final order of exclusion, that failure is reviewable on appeal to the BIA and in habeas proceedings.

3. As alleged, Count IV is DISMISSED in part. To the extent that Count IV asserts a claim that the Haitians in detention have a right of access to persons who are not in detention (counsel or otherwise), that claim is DISMISSED. It is the view of the Court that if such a denial of access in fact takes place and results in harm to the alien in the form of entry of a final order of exclusion, that practice can be reviewed on appeal to the BIA and in habeas proceedings.

4. As alleged, Count V is DISMISSED in its entirety. These procedures are reviewable after entry of a final order of exclusion by appeal to the BIA and in habeas proceedings. Moreover, the Defendants have agreed to cease using mass hearings and have further agreed to give each individual alien, presently in the class defined by the Court, an exclusion hearing and the choice of having a private or public hearing. Thus, Count V is MOOT.

5. As alleged, Count VI is DISMISSED in its entirety. If and when the alleged failure to give an alien notice of his alleged right to claim political asylum results in the entry of a final order of exclusion, that procedure may be challenged in an appeal to the BIA and/or in habeas corpus proceedings.

6. As alleged, Count VII is DISMISSED in part. To the extent that Count VII alleges that the challenged policies and procedures heretofore dismissed are being applied in a discriminatory fashion, Count VII is DISMISSED. If the alleged discrimination results in a final order of exclusion, that discrimination can be challenged on appeal to the BIA and/or in habeas corpus proceedings.

The Court retains jurisdiction over the following claims:

1. Count II in its entirety.

2. Count IV insofar as it alleges that Haitians in detention have First Amendment rights that require them to be given access to persons not in detention (counsel or otherwise). The Court will also hear HRC, Inc.'s claim of a right to access to persons in detention.

3. Count VII only insofar as it alleges that the detention "policy" is currently being applied in a discriminatory fashion against Plaintiffs.

PLAINTIFFS LACK STANDING TO CHALLENGE THE PROCEDURES USED IN EXCLUSION HEARINGS

A more fundamental bar to this Court's exercise of jurisdiction over the Counts heretofore dismissed is Article III of the Constitution.

> [T]he judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

L.Ed.2d 559 (1960) and *United States v. Radia-Solano*, 625 F.2d 577 (5th Cir. 1980), suggest that they are admissible even if illegally obtained.

> Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.

Flast v. Cohen, 392 U.S. 83, 94–5, 88 S.Ct. 1942, 1949–50, 20 L.Ed.2d 947 (1968).

[4] Standing requires "at an irreducible minimum ... the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 [99 S.Ct. 1601, 1607–08, 60 L.Ed.2d 66] (1979), and that the injury 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 [96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976)." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, — U.S. —, —, 102 S.Ct. 752, 758, 70 L.Ed.2d — (1982). The allegations of the complaint before the Court fail to meet every element of this test.

[5] The complaint fails to establish that any causal relationship exists between the putatively illegal conduct of the Defendants and the injury Plaintiffs allege they are threatened with.[11] There has been no showing that the policies and procedures complained of will continue to be used,[12] that use of these procedures will result in the entry of final orders of exclusion, or that the administrative process will not cure the alleged defects.[13] *Hernandez v. Immigration and Naturalization Service*, 539 F.2d 384 (5th Cir. 1976). More significantly, Plaintiffs have not alleged that a favorable decision on the merits is likely to redress their injury. Even if this Court were to grant all the relief Plaintiffs seek, they would still be subject to exclusion proceedings and possibly deportation.

Unless and until the challenged practices result in the entry of final orders of exclusion against Plaintiffs, this Court finds as a matter of law that they suffered no injury in fact.[14] To the extent that the complaint alleges "on information and belief" the allegedly illegal procedures will be used in processing Haitian aliens, there is a claim of threatened injury, but this allegation alone will not meet the test of standing. Apart from the minimal constitutional requirement of injury, the Supreme Court has rec-

11. Such a relationship could easily be established, if it exists, during the administrative proceedings thereby providing this Court with an adequate record on which to render a decision.

12. It is questionable which of the challenged practices and procedures are still being used or would be used if th. injunction were lifted. The fact that this Court must engage in such speculation supports its view that Plaintiffs' claims are not justiciable at this time.

13. It is for these reasons that the Court, in its order modifying the class, found "commonality" among class members only with regard to the detention issues. Clearly there can be no common questions of law and fact where the individual Plaintiffs will be exposed to different practices and procedures during their exclusion hearings. This is true for the typicality requirement as well. The only claims where the named Plaintiffs have presented issues of law or fact common or typical to the class are in connection with their continued detention.

14. Injury is not the use of an allegedly illegal practice procedure but the adverse consequence thereof. Thus, Plaintiffs have a perfect right to object to any practice or policy they find to be objectionable but they are not entitled to review of that practice unless and until they are injured by it, to wit, it results in the entry of a final order of exclusion.

Were this Court to proceed based on the allegations of threatened injury it would have to speculate as to whether and how the alleged unlawful practices would be utilized against the Plaintiffs. The Court believes that it is best not to engage in speculation of this nature and that the need to do so indicates the absence of a ripe controversy. *See Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1971); *O'Shea v. Littleton*, 418 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974).

ognized other limits on the class of persons who may invoke the Court's decisional and remedial powers. *See Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (assertion of a generalized grievance shared in substantially equal measure by all or a large class of citizens does not normally warrant exercise of jurisdiction); *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943); *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953) (Plaintiffs must generally assert their own rights and interest, and cannot rest their claim to relief on the legal rights or interests of third parties).[15] One such limit requires that the injury be to a "legal right" of the Plaintiff. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1929); *Linda R. S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the Plaintiffs' position a right to judicial relief. *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1974).

Under the Constitution, there is no question that aliens who seek to enter the United States "may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by its sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe." *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). It matters not whether the alien is outside the borders of the United States, as in *Kleindienst v. Mandel*, 408 U.S. 753, 762, 92 S.Ct. 2576, 2581, 33 L.Ed.2d 683 (1972); or is in detention as an excludable alien as in *Shaughnessy v. Mezei*, 345 U.S. 206, 210–215, 73 S.Ct. 625, 628–30, 97 L.Ed. 956 (1953); or has been paroled pursuant to 8 U.S.C. § 1182(d)(5) as in *Leng May Ma v. Barber*, 357 U.S. 185, 188–189, 78 S.Ct. 1072, 1074–75, 2 L.Ed.2d 1246 (1958); *Kaplan v. Tod*, 267 U.S. 228, 45 S.Ct. 257, 69 L.Ed. 585 (1925); he is deemed to be unadmitted and has "[n]o constitutional right to entry to this country as a non-immigrant or otherwise." *Kleindienst v. Mandel*, *supra*, 408 U.S. at 762, 92 S.Ct. at 2581.

In the absence of constitutional right of entry, the threatened injury to Plaintiffs must exist by virtue of "statutes creating legal rights, the invasion of which creates standing . . ." *See Linda R. S. v. Richard D.*, *supra*, 410 U.S. at 617 n.3, 93 S.Ct. at 1148 n.3; *Sierra Club v. Morton*, *supra*, 405 U.S. at 732, 92 S.Ct. at 1364. The Immigration and Nationality Act does not give the Plaintiffs a right to enter this country; rather, it establishes a procedure through which an administrative decision can be made on whether an alien should be admitted. *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977).[16]

Throughout the proceedings in this cause, the Defendants have taken the position that the Act entitles Plaintiffs to an exclusion hearing. Indeed, justice requires that the Plaintiffs, having been held in detention for months awaiting exclusion proceedings, be

15. In this regard, the Court has serious questions about Plaintiff HRC's standing to assert the claims of its "members" while asserting claims of its own. HRC is neither a traditional voluntary association nor the kind of entity allowed associational standing in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Instead, HRC purports to make Haitians members of its organization by its definition, without any voluntary act or choice on their part. Moreover, the Court has found, infra, that its members have no standing to sue in their own right and, therefore, one of the prerequisites to organizational standing has not been met. *Id.* at 343, 97 S.Ct. at 2441.

16. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff v. Shaughnessy*, 338 U.S. 537, 544, 70 S.Ct. 309, 313, 94 L.Ed. 317 (1950).

given the opportunity to be heard.[17] But that does not mean that the statute confers standing on these Plaintiffs to challenge the manner in which INS interprets and applies the statute to them particularly when they have not been injured thereby.

[6, 7] Based on the reasons set forth above, the Court finds that the Plaintiffs lack standing to assert the claims heretofore dismissed. This conclusion serves to reinforce the Court's prior ruling that judicial review is available only after the entry of a final order of exclusion and exhaustion of administrative remedies. It is questionable whether any alien that has not been subject to the exclusion procedure would have standing to challenge procedures that "on information and belief" were going to be used against him.[18] Just as Congress cannot, by an affirmative act, expand this Court's jurisdiction beyond that provided for in Article III, *Barlow v. Collins*, 397 U.S. 159, 173, 90 S.Ct. 832, 841, 25 L.Ed.2d 192 (1969), an omission or ambiguity in a statute cannot be construed to allow the adjudication of a nonjusticiable controversy. The procedures set forth in Section 1105a is the sole and exclusive means for review of the issues before this Court and until its prerequisites are complied with, this Court is without jurisdiction to hear Plaintiffs' claims.[19]

CONCLUSION

In spite of the Court's lack of jurisdiction over many of the claims delineated in the complaint, it appears that much of the relief sought therein will be forthcoming. This conclusion is based on Defendants' unequivocal representations to the Court that, with regard to this particular class, individual exclusion hearings will be afforded regardless of the Court's ruling on the merits. In order to insure that these representations are complied with, the Court directs the Defendants to file, within sixty (60) days from the date of this Order, a detailed plan setting forth the method and means that will be utilized for conducting individual exclusion hearings with regard to all class members.[20] Because the Court antici-

17. Most, if not all, of the aliens before this Court did not arrive at ports of entry of the United States. *See* 8 C.F.R. §§ 100, 235.1(a). They arrived on any beach where the currents take them, or were apprehended prior to reaching these shores. There has been no colorable attempt to comply with the immigration laws; rather, the Haitians have attempted to thwart the orderly procedures for entry by arriving in masses, with no way to return to their homeland, and thereafter by uniformly making claims of persecution in their homeland which are difficult, if not impossible, to verify. Under such circumstances there is a serious question, to be decided another day, as to whether the INS would have a right to exclude and deport such aliens without a hearing.

18. If a literal construction of the words of a statute would lead to an absurd result, the statute must be construed so as to avoid that result. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892); *United States v. Mendoza*, 565 F.2d 1285, 1288 (5th Cir. 1978). The Court feels that it would be absurd to read Section 1105a(b) as allowing Plaintiffs to challenge the procedures they believe INS will use during their exclusion hearings before being subject to such hearings and without suffering any injury in fact. The construction the Court has given to that Section will avoid such a result.

19. Plaintiffs' inability to establish an independent basis for this Court to hear the claims heretofore dismissed and the Court's finding that they lack standing with regard to those claims, precludes the Court from granting mandamus relief pursuant to 28 U.S.C. § 1361. *Starbuck v. City and County of San Francisco*, 556 F.2d 450 (9th Cir. 1970). Plaintiffs' failure to exhaust their administrative remedies also bars mandamus relief. *See Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972); *Lane v. Hanberry*, 593 F.2d 648 (5th Cir. 1979).

Similarly, 28 U.S.C. §§ 2201, 2202 do not provide this Court with an independent jurisdictional basis for deciding the dismissed claims. *See Seibert v. Baptist*, 594 F.2d 423, 428 n.17 (5th Cir. 1979) (citing *Red Lobster Inns of America, Inc. v. New England Oyster House, Inc.*, 524 F.2d 968, 969 (5th Cir. 1975); *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 666 (5th Cir. 1967).

The Court reserves ruling on Defendants' Motion to Dismiss or Transfer for Improper Venue.

20. The Court's supervision of this plan should be construed to mean that it affords the aliens who participate therein all of the rights to which they are entitled under the Immigration laws and regulations. Moreover, Plaintiffs are in no way precluded from seeking, if necessary, administrative and judicial review.

pates initiation of pro bono representation projects in all areas where class members are detained similar to that embarked upon by the Dade County Bar Association, the plan submitted shall be structured on the assumption that all class members will be individually represented by counsel. The Court will retain jurisdiction over the class until the plan is operational and its injunction remains in full force and effect until further order of the Court.



Randy BRADY; James Williams; Michael Fox; Jerry Hunter; Francis Pendergrass; Lacy Monds; and Chris Watkins, individually and on behalf of all others similarly situated, Plaintiffs,

and

Curtiss Crawford and Lorenzo Mosely, Plaintiffs-Intervenors,

v.

THURSTON MOTOR LINES, a corporation, Defendant.

No. C-C-76-343-M.

United States District Court, W. D. North Carolina, Charlotte Division.

Feb. 24, 1982.

Employment discrimination case was tried and decided before *Burdine* decision was rendered. On remand, 673 F.2d 1306, the District Court, McMillan, J., held that employees had burden of persuasion throughout to prove every element necessary to support their claims and employer had no burden at any time, notwithstanding that employer had opportunity to articulate, if it wished and could, legitimate nondiscriminatory reasons for its challenged actions.

Order accordingly.

Civil Rights ⇐43

Employees in Title VII action against employer had burden of persuasion throughout to prove every element necessary to support their claims and employer had no burden at any time, notwithstanding that employer had opportunity to articulate, if it wished, and could, some legitimate nondiscriminatory reasons for its challenged actions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Michael A. Sheely, Sheely & Brooks, Bart William Shuster, Plumides & Plumides, Charlotte, N. C., for plaintiffs.

J. W. Alexander, Jr., Blakeney, Alexander & Machen, Charlotte, N. C., for defendant.

JUDGMENT

McMILLAN, District Judge.

This case is back before the court upon the January 11, 1982, remand from the Fourth Circuit Court of Appeals.

The court has again reviewed its lengthy notes taken during the trial, and has repeated the separate analysis of each individual claim, under which several claims were found to have merit, several claims were found to have no merit, and relief for some individuals, and for the class, was ordered.

As the file will show, the court filed a memorandum of decision on the 16th day of July, 1979; findings of fact, conclusions of law, order and judgment in accord with that memorandum were drafted by the plaintiffs; and they were revised at least twice in many significant particulars by the court before final drafts were entered.

The case was tried and decided in the district court before the *Burdine* decision was ever rendered. The district court perhaps did not in semantic perfection "articulate" the precise litany now apparently required. However, the court did not put any burden of proof upon the defendant, *but did require the plaintiff to sustain the burden*

F.R.D. 379 (S.D.N.Y.1979). This standard has not been met by the complaint in this case, and the individual defendants must therefore be stricken from it.

CONCLUSION.

The individual defendants must be stricken from the complaint, and the complaint must be dismissed for lack of subject matter jurisdiction.



Lucien LOUIS, et al., Plaintiffs,

v.

Doris MEISSNER, Acting Commissioner, Immigration and Naturalization Service, et al., Defendants.

No. 81-1269-Civ-ALH.

United States District Court, S. D. Florida, Miami Division.

Sept. 30, 1981.

Haitian refugees brought class actions claiming they were denied certain rights in exclusion proceeding. On plaintiffs' motions for preliminary injunction, the District Court, Hastings, J., held that inasmuch as plaintiff class established likelihood of success on their claims that they were denied access to counsel, and that members of class were not given adequate notice of their legal rights at exclusion presentation, nature and consequences of proceedings nor of their right to file certain claims, and fact that plaintiffs would suffer irreparable harm in absence of preliminary injunction and that public interest would not be disserved, Immigration and Naturalization Service would be preliminarily enjoined from deporting Haitian aliens who arrived in Southern District of Florida on or after May 20, 1981, who sought entry into United States and who were held in detention pending exclusion proceedings at various INS detention facilities.

Motion granted.

1. Injunction ⇐147, 150

In considering four criteria to justify issuance of temporary restraining order or preliminary injunction, no particular quantum of proof is required as to each of criteria, but trial court should utilize balancing type approach in reviewing preliminary injunction or temporary restraining order application.

2. Injunction ⇐137(4), 150

While grant of preliminary injunction would be inappropriate where movant party has little or no chance of success on merits, importance of this requirement varies with relative balance of threatened hardship facing each of parties; moreover, showing that plaintiffs will be more severely prejudiced by denial of temporary restraining order or injunction than will defendant should it be granted, lessens standard likelihood of success that must be met.

3. Injunction ⇐132

While plaintiff seeking preliminary injunction must establish all four factors delineated, crucial question is whether preservation of status quo is necessary in order to protect court's ability to render meaningful decision on merits and if failure to grant temporary relief will allow defendant to harm plaintiff in such a way that court's ultimate decision in plaintiff's favor becomes mere useless dicta, then temporary restraining order or preliminary injunction should issue.

4. Aliens ⇐54.3(1)

Inasmuch as plaintiff class of Haitian refugees established likelihood of success on merits of claims that they were denied access to counsel in exclusion proceedings, that members of class were not given adequate notice of their legal rights at exclusion proceedings, nature of proceedings and consequences of proceedings nor their right to file claims and in view of fact that

refugees would suffer irreparable harm in absence of preliminary injunction and that threatened injury to refugees outweighed any conceivable harm to defendant Commissioner of Immigration and Naturalization Service, Commissioner would be preliminarily enjoined from deporting Haitian aliens who arrived in Southern District of Florida on or after May 20, 1981, who sought entry into United States and who were held in detention pending exclusionary proceedings at various INS detention facilities. Immigration and Nationality Act, §§ 106(b), 208, 292 as amended 8 U.S.C.A. §§ 1105a(b), 1158, 1362.

Ira J. Kurzban, Vera Weisz, Miami, Fla., Bruce J. Winick, Coral Gables, Fla., Kenneth Panner, Miami, Fla., Irwin P. Stotzky, Coral Gables, Fla., for plaintiffs.

Richard A. Marshall, Jr., Asst. U. S. Atty., Miami, Fla., for defendants.

ORDER GRANTING TEMPORARY RESTRAINING ORDER

HASTINGS, District Judge.

THIS CAUSE, came on to be heard on plaintiffs' Renewed Motion for Temporary Restraining Order. Testimony was taken on September 8 and 9, 1981. Based on this and prior testimony, plaintiffs previously filed motions for temporary restraining order and for preliminary injunction, plaintiffs' memoranda in support of same, affidavits submitted by both parties, defendants' responses to interrogatories and requests for admissions, and documents placed in evidence, this Court finds that a sufficient showing has been made by plaintiffs to meet the requirements for a temporary restraining order.

THE STANDARDS FOR A TEMPORARY RESTRAINING ORDER

There are four criteria which the moving party must meet in order to justify issuance of a temporary restraining order or preliminary injunction:

1. A substantial likelihood that the movant will eventually prevail on the merits;

2. The movant will suffer irreparable injury unless the injunction is issued;

3. The injury to the movant outweighs whatever danger the proposed injunction may cause the party or parties opposing the injunction, and that;

4. The injunction, if issued, would not be adverse to the public interest.

Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974); *Di Giorgio v. Causey*, 488 F.2d 527 (5th Cir. 1973); *State of Texas v. Seatrain International, S. A.*, 518 F.2d 175 (5th Cir. 1975).

[1, 2] It is also established in this Circuit that no particular quantum of proof is required as to each of the four criteria, but that the trial court should utilize a balancing-type approach in reviewing a preliminary injunction or temporary restraining order application. *State of Texas v. Seatrain International, S. A., supra*, at 180 ("none of the four prerequisites has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus."); *Siff v. State Democratic Executive Committee*, 500 F.2d 1307 (5th Cir. 1974). While the grant of a preliminary injunction would be inappropriate where the movant party has little or no chance of success on the merits, the importance of this requirement varies with the relative balance of threatened hardships facing each of the parties. *Canal Authority of the State of Florida v. Callaway, supra*, at 576. Moreover, a showing that plaintiffs will be more severely prejudiced by a denial of the temporary restraining order or injunction then will defendants should it be granted, lessens the standard likelihood of success that must be met. *Id.*; See generally, Lubsdorf, The Standard for Preliminary Injunction, 91 *Harv.L.Rev.* 525 (1978).

[3] While the plaintiffs must establish all four factors delineated in *Canal Authority*, the crucial question is whether preservation of the status quo is necessary in order to protect the court's ability to render a

meaningful decision on the merits. If a failure to grant temporary relief, will allow the defendant to harm the plaintiff in such a way that the court's ultimate decision in the plaintiff's favor becomes mere useless dicta, then a temporary restraining or preliminary injunction should issue.

THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR UNDERLYING CLAIMS

In order to grant a temporary restraining order or a preliminary injunction in a case such as this, raising a number of separate claims for relief, it is sufficient if this court, finds that plaintiffs are likely to succeed on *any* of their claims, *See Tenants for Justice v. Hills*, 413 F.Supp. 389 (Ed.Pa.1975), so long as the ultimate victory on this claim could be rendered relevant by the defendants' actions in the interim.

DENIAL OF ACCESS TO COUNSEL

On July 17, 1981, defendants began to remove members of plaintiffs' class out of the State of Florida and to various INS Detention Facilities located throughout the country. Approximately seven hundred of these refugees have been transported to Fort Allen, Puerto Rico, a former army base located in a remote area of the Island. Approximately fifty refugees have been transferred to Morgantown, West Virginia, located in the Northern West Virginia coal fields and having an approximate population of thirty thousand. An additional one hundred refugees were sent to Big Springs, Texas, a semi-desert city of approximately twenty-five thousand people, described as being about two hundred sixty miles west of Fort Worth, three hundred fifty miles east of El Paso, and "really not near anything." Approximately two hundred refugees were transferred to Lexington, Kentucky; approximately forty were transferred to Lake Placid, New York; approximately one hundred twenty were transferred to Otisville, New York; and approximately eighty-five were transferred to Brooklyn, New York. Approximately one thousand of these refugees remain in the Krome North Detention Facility, in Miami, Florida.

Having made a long and perilous journey on the seas to Southern Florida, these refugees, seeking the promised land, have instead been subjected to a human shell game in which the arbitrary Immigration and Naturalization Service has sought to scatter them to locations that, with the exception of Brooklyn are all in desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any, Creole interpreters. In this regard, INS officials have acted as haphazard as the rolling seas that brought these boat people to this great country's shores. Indeed, even though INS officials have been rudderless in the enunciation and application of an immigration policy, when they decided to move the Haitians to these remote areas, they acted with laser-like precision. These refugees were removed from Miami, a city with a substantial immigration bar as well as volunteer lawyers from various organizations expressing an interest in representing these refugees. Miami also has a large Haitian population, and as a result, many Creole speaking individuals able to serve as translators to facilitate the attorney/client relationship, as well as community support groups and family members able to assist these refugees in their exclusion proceedings. From this relatively advantageous location from the prospective of the refugees, INS has distributed them to remote areas lacking attorneys with experience in immigration law, or for that matter, any attorneys at all willing to represent them. Moreover, these areas lack Creole speaking individuals able to act as translators. For example, the court heard testimony that there are no immigration lawyers in West Virginia, and that there are more Miami attorneys listed as specialists in immigration law in the Miami telephone book than there are attorneys in all of Monongolia County, (Morgantown) West Virginia.

Section 292 of the Immigration and Nationality Act, 8 U.S.C. § 1362, as well as INS Regulations, 8 C.F.R. § 236.2(b) provide that individuals subjected to exclusion

proceedings have the right to representation by counsel not at government expense. Although Congress did not provide appointed counsel, Congress clearly intended that individuals in this situation be permitted representation by attorneys willing to provide legal services. By transferring these refugees to desolate, remote areas, wholly lacking in counsel and/or Creole translators, INS has thwarted the statutory and regulatory rights of these refugees to representation in their exclusion proceedings.

In addition, the testimony established that at least in some instances, the notice concerning attorneys provided those refugees in the various locations, which purported to list names, addresses, and telephone numbers of attorneys able to provide representation, were inaccurate. In some instances, they contained stale information listing attorneys' telephone numbers, and addresses where they no longer had offices. On other occasions these lists were misleading, listing names of organizations which had publicly stated their inability to represent these refugees. In some locations, the testimony established that although telephone numbers were provided, there were no available telephones in the detention facility. The court notes the general unavailability of telephones in these facilities, and the obvious problems engendered by providing telephone numbers of attorneys in cities requiring long distance telephone calls.

THE I-122 FORM

The charging instrument in an exclusion proceeding is the I-122 form. Its function is to notify individuals that they are about to be subjected to an exclusion proceeding, of their legal rights at such a proceeding, of the nature of the proceeding, and of the consequences thereof. The defendants have conceded that the I-122 form provided to Haitian refugees is in English only, and is not on its face translated into Creole. Although the government contends that all translations into Creole are made upon the service of I-122 form, the testimony and affidavits submitted establish that such translations were frequently omitted. Moreover, this Court held a six day hearing in June, 1981 that established that even in Miami, where INS Creole translators are presumably proficient, the translations at these proceedings are woefully inadequate. Many of the key words necessary to provide adequate notice were not translated into Creole, but were rather translated into the French equivalent words that were unintelligible to these poorly educated individuals. The court is thus greatly concerned with the INS practice of in effect leaving the adequacy of notice to the varying abilities of translators throughout the country. In view of the negligible cost of providing written translations that would assure uniformity and accuracy in the provision of notice, this Court finds that plaintiffs have demonstrated the likelihood of succeeding on this point.

NOTICE OF THE RIGHT TO FILE AN ASYLUM CLAIM

Section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, as well as INS Regulations, 8 C.F.R. 208 *et. seq.* provide an elaborate procedure for the making of a political asylum claim. Defendants concede that they do not advise individuals of their rights under these provisions to file political asylum claims. Without the provision of such notice, the rights of Haitian refugees to file such claims, given their language literacy and educational problems, would be rendered meaningless. Not only does the INS have a statutory and regulatory obligation to give fair consideration to claims for political asylum, but treaty obligations to which this country is a party, the United Nations Convention and Protocol for the Status of Refugees, impose a parallel duty. The failure of INS to provide notice to the Haitians of their right to apply for political asylum at an early time also frustrates the Haitians' regulatory right to invoke the determination of the INS District Director on this issue, as provided in 8 C.F.R. §§ 208.1, 208.8. The court thus finds that plaintiffs have demonstrated their likelihood of success on this issue.

OTHER ISSUES

Plaintiffs raise a number of other issues concerning the processing of Haitian refugees in exclusion proceedings, the order in which such processing is occurring and the fact that these refugees are held in detention rather than released to the community. Although the court has heard extensive legal argument on some of these points, and although plaintiffs have briefed them, the court, in view of its above findings, at this point finds it unnecessary to address these issues.

IRREPARABLE HARM

Plaintiffs assert that without the temporary restraining order they seek, they will suffer irreparable harm in a number of ways. As the Fifth Circuit has held in *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974), "[a] preliminary injunction may be issued to protect the plaintiff from irreparable injury and to preserve the district court's power to render a meaningful decision after trial on the merits." The "primary justification" for granting preliminary injunctive relief, according to the Fifth Circuit, "is to preserve the court's ability to render a meaningful decision on the merits." *Id.* at 573. This Court finds that a temporary restraining order is necessary to preserve its ability to render a meaningful decision.

Without an injunction against the commencement or continuation of exclusion proceedings in these remote areas for unrepresented Haitians, these refugees will soon receive final orders of exclusion. Upon receiving such an order, they will, by that very fact, be excluded from the class, which is defined in terms of refugees who have *not* received final, non-reviewable order of exclusion. Not only will they be excluded from the class, and therefore be beyond the remedial powers of this Court, but under 8 U.S.C. § 1105a(b), upon the receipt of a final order of exclusion, the sole and exclusive judicial remedy is by means of habeas corpus. As a result, this statutory restriction on judicial review may remove this Court's ability to act at all for those receiving final order. Although this Court believes that its certification of the class is itself sufficient to protect all class members in their rights to the procedures that this Court might ultimately declare to be their due, § 1105a(b) could conceivably be construed in a way to divest this Court of its ability to render a meaningful decision on the merits that would accrue to the benefit of those receiving final orders of exclusion.

In addition, the testimony has amply established that many of the refugees in the remote areas are unrepresented and are unlikely to be represented, either at their exclusion proceedings, at any possible appeal to the Board of Immigration Appeals, or to obtain judicial review of the issuance of a final order of exclusion by habeas corpus. Without such representation, a refugee receiving a final order, will thus be subject to immediate exclusion and deportation from this country. Obviously, the removal from the country of any of the members of the class, will render it impossible for these individuals to receive any benefit from this Court's ultimate adjudication on the merits. Indeed, in an earlier point in these proceedings, INS deported eleven refugees to Haiti pursuant to procedures that the government later agreed were faulty. Unfortunately, the government's concession came too late to assist these eleven individuals. It is to prevent a similar problem that this Court must enjoin the deportation of unrepresented class members. Finally, although the court makes no specific findings on this point, the court does note the extensive findings made by Judge King in *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442 (S.D.Fla.1980), concerning the possibility of persecution and torture of refugees returned to Haiti.

THE THREATENED INJURY TO PLAINTIFFS OUTWEIGHS ANY CONCEIVABLE HARM TO DEFENDANTS RESULTING FROM THE GRANT OF A TEMPORARY RESTRAINING ORDER

The only harm that could result to defendants as a result of the issuance of a

temporary restraining order consists of administrative inconvenience inherent in delaying the holding of hearings for the exclusion of refugees. Such administrative inconvenience is, of course, of no consequence in comparison to the potential losses which the plaintiffs may suffer if temporary relief is not granted. The government does not dispute that under its own statute and regulations, hearings are required. Plaintiffs are not asking that this Court impose on defendants a new, disruptive burden, but only that it delay the continuance of the procedure which must occur in any event. Since the government has not yet carried out hearings for many Cuban and Haitian refugees who arrived prior to the members of the class, it cannot credibly argue that immediate hearings for class members are necessary to avoid injury to it.

Moreover, if the planned hearings are legally defective—and this Court has serious concern as to their adequacy—then they must ultimately be repeated. It thus seems prudent for this Court expeditiously to adjudicate the substantial matters raised by plaintiffs concerning the procedures required by law in exclusion proceedings and avoid the wasted effort of requiring the government merely to repeat inadequate hearings.

THE PUBLIC INTEREST WILL NOT BE DISSERVED

As this Court intends expeditiously to conclude this matter, the public interest will not be disserved by the short restraint on the government going forward in exclusion proceedings for unrepresented refugees. Indeed, the public interest would be served by clarifying the procedural requirements that defendants must adhere to so that they may go about their statutory duty of excluding unlawful aliens in a uniform manner consistent with the requirements of law. "Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations even when they are about to occur or prevent their continuance after they have begun. *Walling v. Brooklyn Braid Co., Inc.*, 152 F.2d 938 (2nd Cir. 1945).

[4] Thus a temporary restraining order would best serve the public's interest. The public's interest is not served by continued acts violative of the law. Nor is it served by deportations which effectively make it impossible for the government to correct its errors and to see that justice is done. Under our system of law, the government owes these refugees the obligation fully to comply with all statutory, regulatory and treaty rights which these individuals may possess. The court has heard sufficient testimony to conclude that plaintiffs have made a substantial showing that, at least in some regards, defendants are forwarding the legal rights of these refugees. Moreover, based on testimony and affidavits submitted by plaintiffs, this Court is seriously concerned that some of these individuals may be deportation cases, rather than exclusion cases, and therefore entitled to full constitutional as well as statutory and regulatory protections. In addition, some may well be Cuban-Haitian entrants, and therefore improperly subjected to exclusion proceedings at this time. Finally, a number of the refugees transferred out of Florida have had attorneys from the Haitian Refugee Center, Inc. file notice of appearances (Form G–28) on their behalf. This constitutes a direct and substantial interference with an ongoing attorney-client relationship. Issues such as these would in effect be buried by the continuation or commencement of exclusion proceedings for unrepresented Haitian refugees.

CONCLUSION

Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED:

That defendants and their agents, employees, and successors, are hereby restrained from commencing or continuing exclusion proceedings for class members held at Fort Allen, Puerto Rico, Big Springs, Texas, Morgantown, West Virginia, and Lexington Kentucky who are unrepresented. In addition, defendants, their agents, employees, and successors, are re-

strained and enjoined from deporting any member of the class.

Based on the representation of government counsel that exclusion proceedings will not be commenced or continued for unrepresented Haitian refugees at the additional detention facilities, this Court finds it unnecessary formally to enjoin the government from holding such hearings for unrepresented Haitian refugees held at the Krome North Detention Facility, Miami, Florida, as well as INS Detention Facilities in Lake Placid, New York, Otisville, New York, Brooklyn, New York and any other INS Detention Facility.

ORDER

SUA SPONTE, the Court finds that the Temporary Restraining Order entered this 30th day of September, 1981 NUNC PRO TUNC to September 9, 1981 has dissolved. In order to maintain the status quo and to be able to render a meaningful decision on the merits (trial on the merits of this cause has previously been advanced with the hearing on the preliminary injunction, Rule 65(a)(2)) said Temporary Restraining Order is hereby converted into and to be continued as a Preliminary Injunction. Defendants, by and through their agents and employees, are hereby enjoined from deporting all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the U. S. and who are presently held in detention pending exclusion proceedings at various *INS* detention facilities, for whom an order of exclusion has not been entered and who are unrepresented by counsel.

ROBERT E., et al., Plaintiffs,

v.

Michael LANE, et al., Defendants.

No. 81 C 1057.

United States District Court,
N. D. Illinois, E. D.

Oct. 5, 1981.

Inmates brought action against prison administrators alleging constitutional deficiency of mental health care treatment. On defendants' motions to dismiss and abstain, the District Court, Getzendanner, J., held that: (1) abstention failed since Illinois statute could not moot entirely plaintiffs' constitutional claims; (2) complaint was sufficient under both "series of incidents" and "staffing, facilities and procedures" tests to raise presumption of illegal conduct; and (3) class certification was appropriate.

Motions denied.

1. Federal Courts ⇐42

In federal question litigation, abstention inquiry boils down to whether asserted federal claim is so insubstantial, implausible, foreclosed by prior decisions of district court or otherwise completely devoid of merit as not to involve a federal controversy within jurisdiction of district court, whatever may be ultimate resolution of federal issues on the merits.

2. Federal Courts ⇐42

Whenever a case can be decided on either state law or federal constitutional grounds, state law resolution should be preferred given long-standing policy of avoiding unnecessary constitutional decision making.

3. Federal Courts ⇐43

Whenever scope of underlying state law is "unclear," courts of affected state should be given opportunity to adjudicate, since they, and not federal courts, are ultimate arbiters of state law.

Marie Lucie JEAN, Herold Jacques, and Lucien Louis, on behalf of themselves and all others similarly situated; Wilner Laberisse and Job Dessin, on behalf of themselves and all others similarly situated; and the Haitian Refugee Center, Inc., a non-profit membership corporation, on behalf of itself and its members, Petitioners and Plaintiffs,

v.

Doris MEISSNER, Acting Commissioner, Immigration & Naturalization Service; Joe G. Howerton, District Director Immigration & Naturalization Service, District VI, Lee Rowland, Assistant District Director for Deportation Immigration & Naturalization Service, District VI; Fred Alexander, Officer In Charge, Krome Avenue North Detention Facility; the Immigration & Naturalization Service; William French Smith, Attorney General of the United States, Respondents and Defendants.

No. 81-1260-Civ-ALH.

United States District Court,
S. D. Florida,
Miami Division.

July 6, 1981.

Haitian refugees who were being detained without parole at various Immigration and Naturalization Service detention facilities filed amended petition for habeas corpus challenging variety of procedures and policies used or threatened to be used in exclusion processing. On INS's return to amended petition and on its motion to have parties dropped and claims severed, the District Court, Hastings, J., held that: (1) amended petition was properly before the court since it was filed prior to responsive pleading; (2) where appropriate, a habeas court may grant injunctive, declaratory and mandatory relief; (3) since refugee petitioners and plaintiffs asserted right to relief jointly and separately in respect to and arising out of same transaction, occurrence, and series of transactions or occurrences involving common questions of law and fact, permissive joinder of those parties and their claims were appropriate, but (4) to prevent hardship that INS would suffer if it was compelled to litigate new claims at this junction, court reserved adjudication on new claims until such time as INS could adequately respond to such claims.

Motion denied.

1. Habeas Corpus ⇐56

Immigration and Naturalization Service's motion to have parties dropped and claims severed could not serve as return to original habeas petition by Haitian refugees who were being detained without parole in various INS detention facilities and for whom a final order of exclusion and deportation had been entered, and thus amended petition brought on behalf of Haitian refugees for whom a final nonappealable order had not been entered was properly before the court since filed prior to any responsive pleading. 28 U.S.C.A. §§ 2242, 2243; Fed. Rules Civ.Proc. Rule 15, 28 U.S.C.A.

2. Habeas Corpus ⇐56, 112

Amending habeas petitions to add new claims for declaratory, injunctive and mandatory relief is not an anomaly but, rather, where appropriate a habeas court may grant injunctive, declaratory and mandatory relief. 28 U.S.C.A. §§ 1651(a), 2243.

3. Federal Civil Procedure ⇐251

Where Haitian refugees, who were being detained without parole in various Immigration and Naturalization Service detention facilities and for whom a final order of exclusion and deportation had been entered, and refugees for whom a final nonappealable order of exclusion and deportation had not been entered sought relief against common defendants, and where both classes challenged same exclusion proceeding policies and procedures, permissive joinder of the parties and their claims was appropriate. Fed.Rules Civ.Proc. Rules 20(a), 21, 28 U.S.C.A.

4. Habeas Corpus ⇐56

Although permitting joinder of new claims brought by Haitian refugees against Immigration and Naturalization Service would promote judicial economy, Immigration and Naturalization Service would suffer hardship if compelled to litigate new claims at this juncture and thus court would only adjudicate all claims set forth in original habeas petition, reserving any adjudication of new claims raised in amended petition until such time as INS had time to adequately prepare and respond to such claims. Fed.Rules Civ.Proc. Rules 12, 20(b), 65(a)(2), 28 U.S.C.A.; 28 U.S.C.A. § 2241.

Kurzban & Kurzban by Ira J. Kurzban, Miami, Fla., Vera Weiss, Miami, Fla., Bruce J. Winick, Coral Gables, Fla., Kenneth Panzer, Miami, Fla., Irwin P. Stotsky, Coral Gables, Fla., for petitioners and plaintiffs.

Richard A. Marshall, Jr., Asst. U. S. Atty., Miami, Fla., for respondents and defendants.

ORDER

HASTINGS, District Judge.

I. FINDINGS OF FACT

THIS CAUSE came before the Court on the Defendants' Return to Amended Petition for Habeas Corpus and Motion to have Parties Dropped and Claims Severed in the Complaint for Declaration, Injunction, and Mandatory Relief (hereinafter referred to as the "Return").

Petitioners[1] filed an Emergency Habeas Corpus Petition under 5 U.S.C. § 1106(a) and 28 U.S.C. § 2241 on 10 June 1981. On 12 June 1981, in open court, Petitioners' counsel informed the court and Respondents of Petitioners' intention to amend their Petition to include all Haitians that are in exclusion proceedings. (T.R. at 12 Hearing of 12 June 1981). On 12 June 1981, Respondents filed a Motion to Dismiss Petitioners' original habeas petition. On 16 June 1981, Petitioners and Plaintiffs[2] filed an Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory, Injunctive, and Mandatory Relief—Class Action (hereinafter referred to as the "Amended Petition").

The Amended Petition challenged a variety of Respondents' procedures and policies used or threatened to be used in the processing for exclusion of Haitian refugees arriving in this country on or after May 20, 1981. It was alleged that these procedures and policies have already been applied to the original habeas Petitioners; some of these procedures and policies have already been applied to the newly added Plaintiffs; and some of these policies and procedures are threatened to be applied to the newly named Plaintiffs.

In addition to realleging the counts contained in Petitioners' original habeas petition, the Amended Petition added several additional claims for relief including a claim for declaratory, injunctive, and mandatory relief against the alleged discriminatory policies and procedures of the Immigration and Naturalization Service (hereinafter referred to as the "INS").

On 17 June 1981 the court, orally, ordered Respondents to reply to the Amended Petition by 19 June 1981. In compliance to such order, Respondents, on 19 June 1981, filed a Return to Amended Petition for Habeas Corpus and Motion to Have Parties Dropped and Claims Severed in the Complaint for Declaration, Injunctive, and Mandatory Relief (hereinafter referred to as the "Return").

1. Petitioners are defined as the class of Haitian refugees arriving in the United States on or after May 20th, 1981 who are applying for entry into the United States, who are detained without parole in various Immigration & Naturalization Service ("INS") Detention Facilities, and for whom a final order of exclusion and deportation has been entered.

2. Plaintiffs are defined as the class of all Haitian refugees arriving in the United States on or after May 20, 1981 who are applying for entry into the United States, who are held in detention without parole at various INS Detention Facilities, and for whom a final non-appealable order of exclusion and deportation has not been entered.

II. DISCUSSION

[1] In determining the propriety of the Amended Petition, the court is directed to 28 U.S.C. § 2242 (1948) which provides in pertinent part:

> Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.
>
> ....
>
> It may be amended or supplemented as provided in the rules of procedure applicable to civil actions...

Amendments to pleadings in civil actions is governed by Rule 15 of the Federal Rules of Civil Procedure, Rule 15, 28 U.S.C.A., as amended, which provides in pertinent part:

> A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires....

The above provisions dictate that a petition for a writ of habeas corpus may be amended once as a matter of course at any time before a responsive pleading is served. A responsive pleading to a habeas petition is defined in 28 U.S.C. § 2243 as a "return" which certifies the "true cause of the detention."

In the instant case, Respondents contest the propriety of the Amended Petition. They allege that their motion to dismiss the original habeas petition was, in effect, their return to such petition. Thus, Respondents submit, Petitioners were precluded from filing any subsequent amendments to the original habeas petition absent leave of the court or consent of the adverse party. The court finds Respondents' position untenable. As previously mentioned, 28 U.S.C. § 2243 explicitly defines a responsive pleading to a habeas petition as a "return" which certifies the "true cause of the detention." The rules governing habeas corpus proceedings do not provide that a motion to dismiss is, or can be construed as, a "return" to a habeas petition. Instead, such rules simply refer back to the Federal Rules of Civil Procedure which specifically exclude motions to dismiss from the definition of "responsive pleadings." Thus, there exists no authority which permits this court to allow Petitioners' motion to dismiss to serve as its return to the original habeas petition. Consequently, the Amended Petition is properly before the court since it was filed prior to Respondents' responsive pleading, albeit filed subsequent to Respondents' motion to dismiss.[3]

[2] Respondents further contend that the Amended Petition is improper since it attempts to add an additional claim for declaratory, injunctive and mandatory relief. Respondents argue that this new claim is a lawsuit which exists separate and apart from the injunctive relief sought in the original petition. Amending habeas petitions to add new claims for declaratory, injunctive, and mandatory relief is not an anomaly in habeas corpus proceedings.

In *Cantrell v. Folsom*, 332 F.Supp. 767 (D.C.M.D.Fla.1971), petitioners applied for writs of habeas corpus; they attacked their convictions and detention as unlawful due to the unconstitutionality of the vagrancy ordinance under which they were arrested, alleging it to be so vague, indefinite, and overbroad as to constitute a denial of due process. Subsequently, the city moved to vacate the underlying convictions of the petitioners in an attempt to moot the habeas corpus proceedings. Petitioners moved to amend the petitions praying leave to proceed as a class on behalf of all those who

3. Assuming *arguendo* Respondents' motion to dismiss could be construed as a "return" for 28 U.S.C. § 2243 purposes, this court would still accept jurisdiction over the amended complaint by granting Petitioners leave to amend pursuant to Rule 15 of the Federal Rules of Civil Procedure. Such rule provides for amendment by leave of court if a responsive pleading has been filed. Rule 15 also provides that "leave shall be freely given when justice so requires."

might have fallen and did fall subject to prosecution for violation of the ordinance, and a declaration that the ordinance was unconstitutional. In permitting the original petitioners to amend their petition to add a new claim for declaratory relief the court reasoned:

> Certainly the declaratory relief sought is available in the appropriate circumstances. See Federal Habeas Corpus, Sokol, § 6.2; *United States v. Martin*, 342 F.2d 701 (3d Cir. 1967):
>
> > 'If the petitioner shows that he "is suffering and will continue to suffer, serious disabilities because of the law's complexities and not because of his fault," then the alternatives are to deny the petitioner a judicial remedy in the federal courts—an alternative that would reflect badly on our system of justice; to give him judicial access by means of habeas corpus; to give him judicial access not by habeas corpus but by some other means.'
>
> Sokol, at page 79, citing from the opinion in *Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).
>
> It appears that the facts averred under the existing circumstances present a real controversy between the parties having adverse legal interests of such immediacy and reality as to warrant a declaratory judgment. *Altvater v. Freeman*, 319 U.S. 359, 63 S.Ct. 1115, 87 L.Ed. 1450 (1943).

332 F.Supp. at 789

Cantrell and similar cases are consistent with 28 U.S.C. § 1651(a) which provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Thus, where appropriate, a habeas court may grant injunctive, declaratory, and mandatory relief.

[3] As a final attack on the Amended Petition, Respondents claim that such Petition represents a misjoinder of parties and claims which operate to the prejudice of Respondents. They therefore request, pursuant to Rule 21 of the Federal Rules of Civil Procedure, that the Plaintiffs be dropped and their claims severed from the original action, and that Plaintiffs be required to properly file a new lawsuit. Rule 21 of the Federal Rules of Civil Procedure provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

The converse of Rule 21 is found in the permissive joinder provision of Rule 20(a), which provides in pertinent part:

> (a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action .... A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

The indicia articulated in Rule 20(a) identify the circumstances in which joint proceedings are considered efficacious in civil cases. The crucial factor is the existence of common questions of law or fact, a consideration which largely determines whether or not joinder is economical in a habeas corpus case.

In the instant case, joinder of the new claims and parties satisfies the requirements of Rule 20(a). Petitioners and Plaintiffs seek relief against common defendants. Both classes raise identical legal claims, challenging the same policies and procedures applied and allegedly threatened to be applied to Haitian refugees in exclusion proceedings. It is alleged that some of the challenged INS procedures and policies have already been applied to members of both classes; some have already been ap-

plied to Petitioners and are threatened to be applied to Plaintiffs. Petitioners and Plaintiffs thus assert a right to relief jointly and severally in respect to and arising out of the same transaction, occurrence, and series of transactions or occurrences involving common questions of law and fact, therefore, making permissive joinder of these parties and their claims appropriate under Rule 20(a).

[4] Although permitting joinder of the new claims in the Amended Petition would promote judicial economy by presenting an opportunity for a convenient and efficient unitary disposition of all the issues involved in this case, the court nevertheless recognizes the hardship the Respondents would suffer if they were compelled to litigate the new claims at this juncture.[4] However, it is the opinion of the court that any potential prejudice to the Respondents can be circumvented by bifurcating the proceedings. The court will therefore proceed to adjudicate all the claims set forth in the original habeas petition, but will reserve any adjudication on the new claims raised in the Amended Petition until such time as the Respondents have had time to adequately prepare and respond to such claims.[5]

And now, to wit, this 6th day of July, A.D. 1981, it is hereby ordered that Respondents' Motion to Have Parties Dropped and Claims Severed in the Complaint for Declaration, Injunctive, and Mandatory Relief is denied. Upon conclusion of the trial on the claims raised in the original habeas petition, Respondents have 60 days to prepare and respond to the new claims raised in the Amended Petition.

4. Respondents argue tenably, that the relatively shorter period of time for responding to a habeas action than for responding to a civil action, and the difficulties in conducting discovery and pre-trial preparation concerning the newly added claims in view of the courts decision to consolidate the hearing on the preliminary injunction with a trial on the merits pursuant to Rule 65(a)(2), operates to the prejudice of Respondents.

Rule 12 of the Federal Rules of Civil Procedure enables the United States or any agency thereof to respond to a civil complaint within 60 days after proper service.

Rule 65(a)(2) of the Federal Rules of Civil Procedure provides that a "court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application [for a preliminary injunction]."

5. Rule 20(b) of the Federal Rules of Civil Procedure provides:

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

SECURITIES & EXCHANGE COMMISSION, Plaintiff,

v.

CABLE/TEL CORP., et al., Defendants.

No. 80 Civ. 7170 (MEL).

United States District Court,
S. D. New York.

July 9, 1981.

The Securities and Exchange Commission brought action for injunction and other relief for what it alleged were fraudulent offer and sale of unregistered investment interests in cable television system. On defendant attorney's motion to vacate default judgment against him and motion of remaining defendants to dismiss portions of the complaint, the District Court, Lasker, J., held that: (1) attorney defendant was entitled to have default judgment entered against him vacated where his excuse for failing to answer complaint was reasonable and promptly asserted, resultant minimal time delay would not act to prejudice of the Commission, and defendant met required burden of asserting facts which, if true, would constitute a meritorious defense, and (2) two counts of the complaint against the remaining defendants were deficient for failing to identify any specific statements by a defendant or defendants, or documents purportedly containing them, and for fail-

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

NO. 82-5772

D.C. Docket No. 81-01260-CIV-EPS

MARIE LUCIE JEAN, et al.,

Plaintiffs,

LUCIEN LOUIS, et al.,

Plaintiffs-Appellees-
Cross-Appellants,

STATE OF FLORIDA,

Intervenor-Appellant,

versus

ALAN C. NELSON, et al.,

Defendants-Appellants-
Cross-Appellees.

Appeals from the United States District Court for the
Southern District of Florida

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

J U D G M E N T
O N R E H E A R I N G E N B A N C

This cause came on to be heard on rehearing en banc with oral argument;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be, and the same is hereby, DISMISSED IN PART, REVERSED IN PART and REMANDED WITH INSTRUCTIONS;

It is further ordered that each party bear their own costs on appeal.

Entered: February 28, 1984
For the Court: Spencer D. Mercer, Clerk

By: [signature]

MAY 4 1984

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5772

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAY 4 1984
Spencer D. Mercer
Clerk

MARIE LUCIE JEAN, ET AL.,

LUCIEN LOUIS, ET AL.,

Plaintiffs,

Plaintiffs-Appellees-
Cross-Appellants,

STATE OF FLORIDA,

Intervenor-Appellant,

versus

ALAN C. NELSON, ET AL.,

Defendants-Appellants-
Cross-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

O R D E R :

(xx) The motion of Appellees for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____ for [ ] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Robert S. Vance
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5772

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAY 4 1984
Spencer D. Mercer
Clerk

MARIE LUCIE JEAN, ET AL.,

Plaintiffs,

LUCIEN LOUIS, ET AL.,

Plaintiffs-Appellees-
Cross-Appellants,

STATE OF FLORIDA,

Intervenor-Appellant,

versus

ALAN C. NELSON, ET AL.,

Defendants-Appellants-
Cross-Appellees.

- - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Florida

- - - - - - - - - - - -

ON PETITION FOR REHEARING EN BANC

(MAY 4 1984)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MARIE LUCIE JEAN, ET AL.,

Petitioners,

v.

ALAN NELSON, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF SERVICE

Pursuant to Rule 26.5(b) of the Rules of the Supreme Court of the United States, I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Certiorari and Appendix was mailed by express mail to the Solicitor General, Department of Justice, Washington, D.C. 20530; to the Immigration and Naturalization Service and Alan Nelson, Commissioner Immigration and Naturalization Service at 425 Eye Street, N.W., Washington, D.C. 20536; and to William French Smith, Attorney General of the United States at 9th and Constitution Avenue, N.W., Washington, D.C. 20530; and was hand delivered to Perry Rivkind, District Director, District VI, Immigration and Naturalization Service, Leonard Rowland, Assistant District Director for Detention and Deportation, District VI, and Franklin Graves, Officer in Charge, Krome Detention Center, at 7880 Biscayne Blvd., Miami, Florida 33138, this 31 day of July, 1984.

By: _____
IRA J. KURZBAN, ESQ.

KURZBAN, KURZBAN AND WEINGER, P.A., ATTORNEYS AT LAW • SUITE 901, 700 BRICKELL AVENUE, MIAMI, FLORIDA 33131 • TELEPHONE (305) 371-0266

AMICUS CURIAE

BRIEF

84-5240

Office-Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE

Supreme Court

of the

United States

October Term, 1984

MARIE LUCIE JEAN, ET AL.,
Petitioners,

vs.

ALAN NELSON, ET AL.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION, amicus curiae

Donald L. Ungar, Esq.
517 Washington Street
San Francisco, California 94111
Tel: (415) 421-0860

Attorney for
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Note, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957 (1982)..... 4

STATEMENT OF THE CASE

The American Immigration Lawyers Association is a national organization of lawyers who devote a substantial portion of their practices to immigration law and thereby have a particular interest in the outcome of this case.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in order to reexamine Shaughnessy v. United States ex rel Mezei, 345 U.S. 206 (1953), and decide whether Mezei should control the outcome of this case.

But for Mezei, the court of appeals might have accepted petitioner's argument that aliens seeking admission to the United States, even for the first time, are protected by the Constitution against incarceration which is based solely upon race or national origin. Instead, the court concluded that its hands were tied

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on that issue because Mezei had ruled out any constitutional rights whatever for such aliens with respect to their admissibility or their detention pending admission or exclusion. 1/

To grant the writ, therefore, this Court must decide whether Mezei really went that far or whether it leaves room for the proposition that no federal agent ever acts totally in the absence of constitutional restraints. At the heart of that issue are two legal principles which bear reconsidera-tion by this Court in light of the circumstances of this case.

The first is the legal fiction that applicants for admission, though physically present on American soil, must be treated as if they were still "knocking on the door" from outside of the country. Being "outside" the country, they remain beyond the scope of

1/ Jean v. Nelson, 727 F.2d 957, 969-975 (11th Cir. 1984).

the Constitution and can assert no rights beyond those mandated by Congress.

The second is that immigration officials are immune from constitutional restraints in the exercise of their power to exclude aliens because that power is derived not from the Constitution but from the concept of national soverignty; the rationale being that because the power to exclude is extra-constitutional, it cannot be inhibited by the Constitution.

In Mezei, this Court did uphold the power of immigration officials to incarcerate indefinitely an alien barred from admission until they could find another country to take him. But it is wrong to jump from that result to the conclusion that no alien seeking admission can ever assert a constitutional right when the issue is his arbitrary detention.

The entry fiction and the soverignty doctrine serve rational and legitimate

purposes by precluding people with no stake in this country from hindering the political branches in deciding just who may enter the country. But that purpose is not served at all by extending the entry fiction and sovereignty doctrines to the detention of people behind prison bars solely because of their color or place of origin.

As one commentator has noted, aliens seeking admission, should be permitted to fall back on the Constitution when the government confines them without reason. 2/ This analysis is based on the plurality opinion in Reid v. Covert, 354 U.S. 1 (1957) where four justices declared:

> The United States is entirely a creature of the Constitution... It can only act in accordance with all the limits imposed by the Constitution.

2/ Note, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957 (1982).

According to the plurality in that case, whenever the government acts, it must draw its power from the Constitution and is thereby subject to all of its accompanying limitations. When this analysis is taken to its logical conclusion, the Constitution must be found to limit the government whenever and on whomever it acts, citizens and alien alike.

This argument was raised before the court below and found unsatisfactory. The court reasoned that if such an argument were accepted, "all aliens in all circumstances would presumably be entitled to the full range of constitutional protections" and to that extent would inhibit the political branches plenary powers of exclusion.

This is not so. The issue is not whether these petitioners or other Haitians are entitled to the full panoply of

constitutional guarantees afforded to American citizens. Nor would measuring their complaint by constitutional standards impinge upon the government's power to exclude them from the country. Rather, all they argue is for the proposition that their real-life, non-fictional presence on American soil, does at least clothe them with the constitutional right to complain that they are being held behind bards on the basis of nothing more than their race or national origin.

CONCLUSION

Few people, unacquainted with the history of the entry fiction at issue here, would even dream that the United States of America could sanction racial discrimination as blatant as that which, so far, has been sanctioned here. Such discrimination is abhorrent and inconsistent with the principles on which this nation is founded. It should be sanctioned no longer. That alone is sufficient reason for this Court to grant the writ.

Respectfully submitted,

Donald L. Ungar, Esq.
Attorney for American
Immigration Lawyers
Association

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
AUG 31 1984
ALEXANDER L. STEVAS
CLERK

No. 84-5240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, *et al.*,
Petitioners,

v.

ALAN NELSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MEMBERS OF CONGRESS PARTICIPATING IN THE HAITIAN REFUGEE TASK FORCE AND THE CARIBBEAN TASK FORCE OF THE CONGRESSIONAL BLACK CAUCUS, THE NATIONAL CONFERENCE OF BLACK LAWYERS, AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE IN SUPPORT OF THE PETITION

ROBERT H. KAPP *
DAVID W. BURGETT
PATRICK B. FAZZONE
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500
Counsel for Amici Curiae

RODERIC V. O. BOGGS
CAROLYN WALLER
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Of Counsel

* Counsel of Record

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QUESTION PRESENTED

Whether intentional and invidious discrimination by federal officials, in incarcerating black Haitian refugees in prisons and detention camps on the basis of their race and national origin, is wholly immune from constitutional scrutiny under the equal protection guarantee of the Fifth Amendment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-5240

MARIE LUCIE JEAN, *et al.*,
Petitioners,
v.
ALAN NELSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MEMBERS OF CONGRESS PARTICIPATING IN THE HAITIAN REFUGEE TASK FORCE AND THE CARIBBEAN TASK FORCE OF THE CONGRESSIONAL BLACK CAUCUS, THE NATIONAL CONFERENCE OF BLACK LAWYERS, AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE IN SUPPORT OF THE PETITION

INTEREST OF *AMICI*

This brief is submitted on behalf of the National Association for the Advancement of Colored People, Inc. (NAACP); the National Conference of Black Lawyers (NCBL); the Southern Christian Leadership Conference (SCLC); the following Members of Congress, who are members of the Haitian Refugee Task Force of the

Congressional Black Caucus—Representative Walter E. Fauntroy (Chairman), Representative George W. Crockett, Jr., Representative Major R. Owens, and Representative Edolphus Towns; and Representative Mervin M. Dymally, who is Chairman of the Caribbean Task Force of the Caucus.

The NAACP is a non-profit corporation serving approximately 500,000 members nationwide, whose objectives include the achievement of equal rights and the elimination of racial discrimination. The NCBL is a non-profit national membership organization comprised of black attorneys, among whose goals is the elimination of invidious discrimination from law and public policy. SCLC is a non-profit membership organization dedicated to the achievement and protection of civil rights for all minorities. The NAACP, NCBL, and SCLC are interested in this case because of the effects of invidious discrimination on black Haitians, and because the decision below also threatens minority citizens by eroding the principle that the Constitution universally condemns invidious race discrimination.

As members of the Haitian Refugee and Caribbean Task Forces of the Congressional Black Caucus, the congressional amici are concerned with eliminating discriminatory Immigration and Naturalization Service (INS) practices aimed at Haitians, many of whom have sought refuge in their districts. As Members of Congress, these amici have a compelling interest in the availability of judicial review to ensure that executive agencies implement legslation, including the immigration laws, consistently with the Constitution. Their interest is particularly compelling where, as in this case, INS personnel contravened legislative policy condemning the use of racial criteria in the immigration context.[1]

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[1] The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 36.1.

REASONS FOR GRANTING THE WRIT

INS officials intentionally discriminated against petitioners, black Haitian refugees, on the basis of their race and national origin, by singling them out from other admission applicants for prolonged incarceration in remote federal prisons and detention camps. *Jean v. Nelson*, 711 F.2d 1455, 1501 (11th Cir. 1983) (App. A-35 to A-81).[2] In fact, the INS was well aware when it resumed detention of excludable aliens in the early 1980's that the detention camps would largely be filled by black Haitians.[3]

The evidence of intentional discrimination in the incarceration of black Haitians was largely unrebutted, except by the government's "mere protestation." *Id.* at 1494 (App. A-74). A "plethora" of evidence demonstrated that INS officials specifically targeted Haitians for detention. *Id.* at 1490 (App. A-70). As a result, black Haitians were incarcerated with far greater frequency than were all other aliens. *Id.* at 1488 (App. A-68). Once incarcerated, Haitians generally were kept in detention for prolonged periods while other aliens either were detained temporarily at the port of entry or paroled[4] pending their exclusion hearings. *Id.* at 1487-1502 (App. A-67 to A-82). Unlike aliens of other nationalities or races, petitioners were separated from their families and shipped to remote detention centers in what the district court described as a "human shell game."

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[2] These factual findings were not questioned by the court sitting *en banc*.

[3] Plaintiffs' Exhibits (Pl. Ex.) 71A, 71B. The Attorney General realized that the policy ultimately adopted would inevitably be recognized as establishing "concentration camps" for black Haitians. Pl. Ex. 71A at 36th page (Memorandum of Attorney General, May 19, 1981).

[4] The Attorney General has authority to release ("parole") aliens pending exclusion or deportation hearings under 8 U.S.C. § 1182(d)(5)(A) (1982).

Louis v. Meissner, 530 F. Supp. 924, 926 (S.D. Fla. 1981) (App. A-144, A-146). At many of these isolated camps, medical facilities were inadequate and immigration counsel was unavailable.[5] Petitioners were held in substandard facilities or otherwise subjected to conditions considerably harsher than those faced by most non-Haitian detainees.[6] Some were physically abused or deprived of necessary medical care.[7]

The Eleventh Circuit ruled that this invidious discrimination violated the equal protection guarantee of the Fifth Amendment. *Jean v. Nelson*, 711 F.2d at 1487-1502 (App. A-67 to A-82). The court then granted a rehearing *en banc*. Without questioning the panel's findings of intentional and invidious race and national origin discrimination, the court ruled that those facts were of no constitutional consequence because the Constitution places no restrictions whatsoever on the government's incarceration of an alien pending a hearing on admission. *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) (App. A-1, A-19).

The sole question which this Court is asked to address is whether invidious race and national origin discrimination in the incarceration of excludable aliens is wholly immune from constitutional scrutiny under the equal protection guarantee of the Fifth Amendment.[8] This

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[5] Trial Transcript (T.) at 777, 977, 1258.

[6] *Id.* at 918-919; *Jean v. Nelson*, 711 F.2d at 1490-1491 (A-70 to A-71).

[7] T. at 1224, 1251, 1258.

[8] The ruling as to which review is sought does not involve petitioners' rights, whether procedural or substantive, with respect to their admission to this country. In particular, petitioners do not challenge before this Court the premise that the Constitution limits neither the grounds on which an alien seeking initial admission may be excluded, nor the procedures employed in making that determination. Nor would review of this case require an assessment of the *level* of scrutiny mandated by the Constitution, or the applicability or scope of any constitutional guarantees other than equal protection.

Court should grant the writ for two compelling reasons. First, since the post-Civil War constitutional amendments, no court other than the court below has held under any circumstances that the government's incarceration of a person on the basis of his race or national origin was immune from all constitutional scrutiny. The practical import of the question presented could not be greater, since it involves a serious deprivation of liberty, under circumstances that are lamentably capable of repetition. Second, the Eleventh Circuit decision conflicts with well-established constitutional principles dictating that the discriminatory conduct of INS officials in this case is subject to constitutional review. This Court should resolve this conflict among the circuits and with this Court's decisions, and decide "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 17.1(a) & (c).

I. UNTIL THE DECISION BELOW, NO RULING SINCE THE CIVIL WAR HAS HELD UNDER ANY CIRCUMSTANCES THAT THE GOVERNMENT'S DEPRIVATION OF A PERSON'S PHYSICAL LIBERTY ON THE BASIS OF HIS RACE OR NATIONAL ORIGIN WAS IMMUNE FROM CONSTITUTIONAL SCRUTINY.

Not since the Dred Scott decision[9] has this Court indicated under any circumstances that the government could deprive a person of physical liberty on the basis of his race or national origin, wholly free from constitutional scrutiny. Nor has any other court ever held that invidiously discriminatory incarceration is immune from all constitutional review—until the decision below. Indeed, it appears that neither this Court nor any other

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[9] *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

court has held invidious racial discrimination to be immune from constitutional scrutiny when impinging on *any* kind of liberty interest, except the privilege of being admitted to the country, which is not at stake here.[10]

No principle is more firmly established in our law, or more fundamental to our nation's values, than that race discrimination has no place in our government. Our nation's repudiation of invidious race and national origin discrimination is reflected in the equal protection guarantee of the Fifth and Fourteenth Amendments, which subjects the use of race and national origin criteria to "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Invidious discrimination by the INS on the basis of race and nationality is also squarely condemned by congressional policy.[11] The overwhelming importance of the nondiscrimination principle, and the utterly unprecedented nature of the decision below, demand that this Court grant review to determine whether the invidious incarceration of petitioners on the basis of their race is wholly beyond constitutional scrutiny.

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[10] *See* section II.B, pp. 10-13 *infra*.

[11] In 1965, Congress abolished the national origin quota system and special immigration restrictions relating to Orientals, and forbade discrimination based on race, sex, nationality, place of birth, or place of residence in all immigration matters. Act of Oct. 3, 1965, P.L. 89-236, 76 Stat. 911; 8 U.S.C. § 1152(a) (1982).

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE PRECEDENTS OF THIS AND OTHER COURTS, WHICH DEMONSTRATE THAT THE INCARCERATION OF ALIENS ON THE BASIS OF THEIR RACE AND NATIONAL ORIGIN IS SUBJECT TO CONSTITUTIONAL SCRUTINY, WITHOUT REGARD TO WHETHER THEY HAVE "ENTERED" THE COUNTRY.

A. The Fifth Amendment Requires Equal Protection Whenever the Federal Government Deprives a Person of Life, Liberty or Property, Without Regard to the Victim's Citizenship or Whether the Deprivation Occurred Within the Country.

The Eleventh Circuit's holding that the action of INS functionaries in incarcerating petitioners on the basis of race is beyond constitutional scrutiny is fundamentally at odds with the principle that "[t]he Constitution of the United States . . . covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex Parte Milligan*, 71 U.S. (4 Wal.) 2, 120-121 (1866). No circumstance of this case—including the nature of the governmental action, the citizenship of its victims, and the fact that petitioners had not been officially "admitted" to the country at the time of the action—justifies a departure from that basic principle.

The Fifth and Fourteenth Amendments require that the government afford due process, including equal protection, whenever it deprives a person of "life, liberty, or property." U.S. Const., Amend. V & XIV, § 1. The requirement is nowhere more clearly in play than when the government deprives a person of his freedom of movement. *See, e.g., Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment). In this case, petitioners challenge their incarceration in federal prisons and detention camps on the basis of race, a form of government action to which the Constitution clearly applies. *See Korematsu v. United States*, 323 U.S. at 216 (detention of Japanese Americans in "relocation centers").

Foreign nationals as well as United States citizens are protected by the Fifth Amendment. The clause expressly protects all "persons," making no reference to citizenship. *See, e.g., Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (alien outside the United States entitled to just compensation for taking of property). Thus, this Court has long held that aliens are "persons" entitled to equal protection under both the Fifth and Fourteenth Amendments. *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886) ("The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China."); *see also Plyler v. Doe*, 457 U.S. 202, 212 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' . . . [protected by the Due Process Clauses of the Fifth and Fourteenth Amendments]"); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

This and other courts have recognized that governmental incarceration of all aliens is subject to constitutional scrutiny. In *Wong Wing v. United States*, 163 U.S. 228 (1896), this Court reviewed and struck down a statute authorizing administrative officials to imprison Chinese nationals found to be in this country illegally, holding that they could not be deprived of liberty without due process. *Id.* at 238. Similarly, the Tenth Circuit has indicated that due process protections are applicable "when imprisonment [of an alien facing exclusion] is for an indefinite period, continued beyond reasonable efforts to expel the alien." *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981). *Accord, Diaz v. Haig*, No. C81-235B (D. Wyo. September 3, 1981). An excludable alien also may not be incarcerated as the result of a criminal conviction unless the strictures of the Fifth Amendment have been met. *E.g., Wong Wing*, 163 U.S. 228; *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979); *United States v. Casimiro-Benitez*, 533 F.2d 1121 (9th Cir.), *cert. denied*, 429 U.S. 926 (1976).

Constitutional protections apply regardless of whether the person deprived of liberty is—or is deemed to be—inside the country, outside it, or "at the border." *See, e.g., Reid v. Covert*, 354 U.S. 1, 7 (1957) (plurality opinion); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922).[12] Thus, for example, aliens are protected from unreasonable searches and seizures even if the challenged intrusion occurs outside the United States. *United States v. Demanett*, 629 F.2d 862 (3d Cir. 1980) (Colombian nationals subjected to a search on board ship), *cert. denied*, 450 U.S. 910 (1981); *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974) (Italian national kidnapped and subjected to wiretapping abroad). Similarly, constitutional procedural rights were held applicable in a criminal trial of aliens conducted overseas by a United States court. *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979). Finally, it has been held that aliens stopped at the border by immigration officials receive the protection of the Fifth Amendment, including the privilege against self-incrimination. *Henry*, 604 F.2d at 914; *see also Casimiro-Benitez*, 533 F.2d 1121. Thus, even if one treats petitioners as if they were outside the United States or "stopped at the border," there is no basis for concluding that their incarceration is exempt from constitutional scrutiny.

The decision below also conflicts with the Tenth Circuit's rejection of the government's contention in *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (10th Cir. 1975) that its actions under the parole statute are beyond con-

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[12] A narrow exception applies where the interest at stake is merely the privilege of being in the country, in which case constitutional restrictions are inapplicable to those who have not already effected an "entry." *See* section II.B, pp. 10-13 *infra*. Deprivations of physical liberty, however, fall within the general rule rather than the limited exclusion decision exception.

stitutional review. The court held that the Attorney General's discretionary decisions with respect to paroling excludable aliens are not immune from constitutional scrutiny under the due process clause.

B. The Entry Doctrine Applies to the Exclusion of Aliens and Not to Their Incarceration.

The Eleventh Circuit rested its unprecedented decision on a fundamental misconception of the "entry doctrine." That doctrine provides that aliens who have not "entered" the United States have no constitutional protection with respect to their admission. It has never been applied to invidious discrimination in incarceration, and its rationale has no relevance to incarceration.

To assess the scope of the entry doctrine, one must understand its origin and function. This Court has held that the power to regulate immigration is an essential attribute of sovereignty. *Nishimura Ekiu v. United States*, 142 U.S. 651 (1982); *The Chinese Exclusion Case*, 130 U.S. 581 (1889). Accordingly, the political branches of government have broad discretion in controlling the nation's borders, including complete discretion to select criteria for the initial admission of an alien, and to establish procedures by which those criteria will be applied. *Id.* Once an alien has entered the country, however, he may not be expelled or denied re-admission without the benefit of certain constitutional protections.[12] *See, e.g., Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953); *The Japanese Immigrant Case*,

[12] The Immigration and Nationality Act provides that an alien awaiting a decision on admission can either be detained or temporarily paroled (*i.e.*, released) until his hearing. 8 U.S.C. § 1182(d)(5)(A) (1982). An alien who is detained within the country or released pending the admission decision is deemed not to have entered for the purpose of the entry doctrine. The consequence of this fiction is that he stands on the same footing with respect to his admission—*i.e.*, lacking constitutional protection—as when he was first stopped at the border.

189 U.S. 86 (1903). The rule that the applicability of constitutional protections to admission depends upon whether the alien has "entered" the United States is known as the "entry doctrine."

This case does not involve admission, but the alien's right not to be deprived of physical liberty on grounds of race or national origin. Therefore, the function of the entry doctrine is not implicated. For the purpose of the present petition, petitioners do not assert a right to admission, nor any procedural rights with respect to the admission decision. They seek only temporary release from custody pending determination of admissibility. Parole will have no effect on their rights with respect to admission, for those detained and those paroled stand in exactly the same shoes. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *Kaplan v. Tod*, 267 U.S. 228 (1925). Thus, petitioners' challenge to racial and national origin discrimination in incarceration does not, even indirectly, put in question the political branches' plenary authority over admission.

Consistent with the entry doctrine's purpose, this Court has applied it only in cases involving an alien's admission. In no other instance have an excludable alien's rights been held limited by the entry doctrine. Thus, in its most recent description of the doctrine, this Court took pains to emphasize that "an [excludable] alien . . . has no constitutional rights *regarding his application [for admission]*." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (emphasis added). The Court was careful not to suggest that excludable aliens lack constitutional protection in any other context.

This Court's precedents are consistent with the limited scope of the entry doctrine described in *Landon*. In the seminal entry doctrine case, *Nishimura Ekiu*, 142 U.S. 651 (1892), the Court addressed the question of the process due to an excludable alien who was allowed to disembark and remain in the country briefly pending a

determination of her admissibility. The Court held that unadmitted aliens are due only that process granted by Congress and Executive officials acting within the scope of their delegated powers. *Id.* at 660. Nothing in the Court's opinion suggests that plenary congressional authority with respect to admission standards and procedures has any bearing on constitutional rights applicable to aliens in any other context.

The distinction between the rights of admitted and unadmitted aliens was clarified in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). The Court held that the exclusion of a resident alien without notice of the charges against him violated the Fifth Amendment. However, the Court indicated that the due process clause of the Fifth Amendment would not protect an excludable alien in exclusion proceedings.[14] *Id.* at 600. The Court did not address the applicability of constitutional protections with respect to actions other than exclusion.[15]

In sum, the rationale of the entry doctrine is inapplicable to this case. The cases in which it has been applied stand in stark contrast to this and other cases

[14] The Court applied this principle in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The Court also applied the entry fiction, holding that Mezei's presence on Ellis Island did not afford him rights greater than before he debarked. As in the other cited cases, the Court neither addressed race discrimination nor suggested that aliens awaiting an exclusion determination lack constitutional protection with respect to incarceration. *See* section III.A, pp. 13-16 *infra*.

[15] In one broad passage, the Court stated that "excludable aliens . . . are . . . not within the protection of the Fifth Amendment." *Kwong Hai Chew*, 344 U.S. at 600. It is clear from the context, however, that the Court was addressing the protections applicable in an exclusion proceeding, and did not purport to suggest, much less hold, that protections are lacking in other areas. Indeed, such a suggestion would have been flatly inconsistent with holdings recognizing that aliens are protected by the Constitution. *See* section II.A, pp. 7-10, *supra*.

in which excludable aliens assert the violation of constitutional rights by official actions other than exclusion or exclusion procedures. In those cases, reviewed in section II.A, the entry doctrine is entirely ignored,[16] or mentioned only by way of pointing out its inapplicability.[17] The Supreme Court should grant review to resolve the conflict between the Eleventh Circuit's unprecedented and expansive view of the entry doctrine and the narrower concept embodied in the decisions of the other lower courts and this Court.

III. THE RATIONALES RELIED UPON BY THE ELEVENTH CIRCUIT CANNOT WITHSTAND ANALYSIS.

A. The Court Below Rested Its Holding on a Fundamental Misreading of *Shaughnessy v. United States ex rel. Mezei*.

The Eleventh Circuit declined to perform an independent assessment of the applicability of equal protection to the incarceration of an excludable alien pending an exclusion decision because it believed the issue was resolved definitively in *Mezei*.[18] *Jean*, 727 F.2d at 974-75 (App. A-18 to A-19). That ruling represents a fundamental misreading of this Court's opinion.

After Mezei arrived at Ellis Island, the INS determined that he posed a security threat. It ordered him excluded without a hearing, pursuant to emergency regulations which Congress had authorized for times of war or a declared national emergency. While awaiting de-

[16] *See, e.g., Russian Volunteer Fleet*, 282 U.S. 481; *Demanett*, 629 F.2d 862; *Toscanino*, 500 F.2d 267.

[17] *See, e.g., Wong Wing*, 163 U.S. at 237; *Rodriguez-Fernandez*, 654 F.2d at 1386-87; *Henry*, 604 F.2d at 913-14.

[18] While finding the result "compelled" by *Mezei*, the court was moved to point out that that decision has been "heavily criticized." *Jean*, 727 F.2d at 971 (App. A-15).

portation, Mezei filed a habeas corpus petition challenging his continued exclusion and seeking permission to go to the mainland. The relief sought would have amounted to an indefinite admission, even if styled as "temporary" parole pending deportation, because no nation contacted by Mezei or the INS would accept him. Most of the Court's opinion was devoted to establishing that Mezei could be excluded without a hearing. Although he had debarked, he was deemed not to have "entered" the United States and thus had no right to due process with respect to his admission.

In the penultimate paragraph, the Court reiterated that Mezei's debarkation could not create additional rights because both aliens on board and those on Ellis Island are regarded as "stopped at the border." [19] In the final paragraph, the Court rejected the proposition that "respondent's continued exclusion deprives him of any statutory or constitutional right." *Mezei*, 345 U.S. at 215. It is not certain whether the Court viewed constitutional protections as inapplicable to post-exclusion confinement, or applicable but not infringed. In any event, it is clear that the Court's rationale and holding did not go beyond the case of an alien already "barred from entry on security grounds." Both the fact that the exclusion determination already had been made and the involvement of national security considerations were critical. The Court observed that to admit an alien *already* denied the privilege of entry, particularly where the admission would be permanent in fact, if not in name, "nullifies the very purpose of the exclusion proceeding." *Id.* at 216. Furthermore, in "[a]n exclusion

[19] Amici's position is consistent with the Court's observation. They do not assert that petitioners effected an "entry" or otherwise acquired constitutional protection upon debarkation. Rather, they assert constitutional rights that apply without regard to entry. *Mezei*, by contrast, involved two sets of rights for which entry has been held to be a prerequisite: procedural due process with respect to admission, and certain statutory release procedures.

proceeding grounded on . . . national security . . . neither the rationale nor the statutory authority for such release exists. . . ." *Id.* The Court declined to substitute its judgment for the congressional determination that aliens ordered excluded should not be permitted even a temporary entry.

None of the critical circumstances in *Mezei* is present here. Petitioners challenge government practices in the incarceration of excludable, not excluded, aliens. Their temporary parole would not defeat the purpose of the proceeding, which is to determine the merits of their applications for political asylum.[20] The government does not contend that petitioners pose a security risk nor that they were incarcerated on that basis.

Mezei did not allude to, much less purport to decide, the issue central to this case: whether invidious race discrimination in the incarceration of excludable aliens is immune from constitutional scrutiny. The Court's treatment of *Mezei*'s procedural rights does not suggest that the equal protection principle would not apply to the substantive decision to incarcerate.[21]

Thus, contrary to the Eleventh Circuit's conclusion, *Mezei* does not "compel" the conclusion that excludable aliens lack constitutional protection with respect to incarceration pending an exclusion decision. Until the decision below, no court had interpreted *Mezei* as holding

[20] Nor would temporary parole thwart the political branches' plenary control over admission. In contrast to the situation in *Mezei*, deportation will still be possible since Haiti is willing to receive petitioners. *Jean*, 727 F.2d at 974 n.26 (App. A-18).

[21] Because an alien who has entered the country is likely to have greater ties to the community, his stake in being permitted to remain is greater, and he is arguably entitled to greater procedural protection. No such rationale would support a difference in treatment of admitted and unadmitted aliens with respect to racial discrimination.

the Constitution inapplicable to the incarceration of excludable aliens. Indeed, the lower court's broad view that this Court has ruled out the applicability of constitutional protections to excludable aliens in all circumstances related to admission conflicts with decisions of the Second Circuit, *Augustin v. Sava*, No. 83-2326, slip op. at 3877-78 (2d Cir. May 22, 1984);[22] *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983), and the Tenth Circuit, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d at 1388.

B. No "Relationship" to the Exclusion Process Places the Incarceration of Petitioners on the Basis of Their Race Beyond Constitutional Review.

The Eleventh Circuit rationalized the result on the theory that the "relationship" between the exclusion decision and incarceration pending an exclusion hearing supported expansion of the entry doctrine. According to the court, the "key issue" was whether incarceration was "integral" to the exclusion process. *Jean*, 727 F.2d at 971 (App. A-15). It answered this question affirmatively, on the ground that one end served by incarceration is to prevent the exclusion process from being preempted by the applicant absconding. This theory suffers from at least three fatal flaws.

First, even assuming *arguendo* that some "relationship" to exclusion might be so strong as to justify an expansion of the entry doctrine, the result below is untenable because the court focused on the wrong relationship. The court examined the relationship between the exclusion process and incarceration in general or incarceration based on a risk of absconding. However, the INS did not base its actions here on any perceived risk

[22] In *Augustin*, the Second Circuit indicated that "it appears likely that some due process protection surrounds the determination of whether an alien has sufficiently shown that return to a particular country will jeopardize his life or freedom. . . ." *Id.*

of absconding,[23] and petitioners do not challenge the general authority of the INS to detain refugees pending hearings. Petitioners' sole challenge is to incarceration based on invidious race and national origin discrimination. To establish that INS incarceration practices are beyond constitutional scrutiny by virtue of a "relationship" with the exclusion decision, it must be shown that *the use of race* as an incarceration criterion advances that process. This showing has not been made, and would in any event be impossible.[24] Since there is *no* plausible basis, it is unnecessary to consider the degree of relationship that might justify expansion of the entry doctrine.

Second, even if the court below had focused on the relationship between the challenged practice—discriminatory incarceration—and the exclusion process, there is no support for the theory that a mere "relationship" to an area of legislative or executive discretion eviscerates constitutional protections. Indeed, this Court's decisions are to the contrary. For example, the war power, like authority over immigration, is confided to the Congress and the Executive, who enjoy a "wide scope for the exercise of judgment and discretion" in exercising it. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). *See* L. Tribe, *American Constitutional Law* § 5-16 at 275 (comparing the war and immigration powers). Nevertheless, this Court has not hesitated to subject actions having a clear relationship to the war power to constitutional scrutiny, particularly when those actions involve racial or national origin classifications. *Korematsu*, 323 U.S. 214, involved the quarantine of people of Japanese ancestry during World War II. Notwithstanding the uncontested fact

[23] T. at 1160, 2035, 2338, 2396, 2398.

[24] There is no basis for thinking that race evidences a propensity to abscond or a threat to security, or implicates any other conceivable legitimate concern. Thus, the constitutional prohibition of invidious discrimination does not inhibit any legitimate function of detention.

that the challenged actions were all taken pursuant to the war power, the Court subjected them to "rigid" scrutiny. Thus, notwithstanding broad congressional authority, "war powers" cannot be used as a "talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *United States v. Robel*, 389 U.S. 258, 263 (1967). Nor does the incantation of "exclusion power" or "excludable alien" dictate that the incarceration of petitioners can be ordered with the same lack of constitutional safeguards as the exclusion decision.[25]

The third fatal flaw in the Eleventh Circuit's theory is that it proves far too much. No constitutional right would be applicable to any INS practice related to the exclusion function. Immigration practices equally or yet more outrageous than incarceration on the basis of race would be free from constitutional scrutiny. Boats of refugees could be sunk; border guards could shoot people attempting to cross the border without authorization; vessels owned by nonresident aliens could be confiscated without just compensation, on the mere suspicion that they would be used for illegal immigration—all immune from constitutional scrutiny. It strains the imagination to suppose that, if such practices arose, a court could deem them not to be deprivations of life, liberty, or property calling for constitutional review. As Justice Jackson has pointed out, such cannot be the meaning of this Court's decisions.[26]

[25] *Landon*, 459 U.S. 21, also indicates that the mere involvement of exclusion does not automatically mean that legal standards governing initial admission apply. That case involved an alien who returned to the United States after a short absence. Although the Court explicitly recognized that the issue was entry, rather than deportation of a person already present in the country, it held that the alien's ties to the community justified the "assimilation" of her status to that of a resident for the purpose of due process protection. The Court thus rejected a wooden approach according to which the mere involvement of exclusion immediately precludes any constitutional protections. Rather the Court looks to the particular facts involved to determine whether the purposes of the entry doctrine would be served.

CONCLUSION

This case presents a profound and tragic irony. Petitioners came to this country risking life itself to seek safe harbor from oppression. Having come in a quest for freedom, they were incarcerated in prisons and detention camps because of their race and national origin. The holding that the federal government can deprive these people of the most basic freedom—physical liberty—by application of the criterion most condemned by our history and values—invidious racial discrimination—without the slightest degree of constitutional scrutiny, is too unprecedented, its rationale too at odds with our basic values, and its consequences too great, to escape review by this Court.

The writ should be granted.

Respectfully submitted,

ROBERT H. KAPP *
DAVID W. BURGETT
PATRICK B. FAZZONE
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500
Counsel for Amici Curiae

RODERIC V. O. BOGGS
CAROLYN WALLER
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Of Counsel

* Counsel of Record

[26] Justice Jackson noted that due process would be violated if an excludable alien were thrown into the sea, set adrift, or deprived of his valuables. *Mezei*, 345 U.S. at 226-27 (dissenting opinion).

AMICUS CURIAE

BRIEF

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No. 84-5240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, *et al.*, *Petitioner*,

v.

ALAN NELSON, *et al.*, *Respondent*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE THE PROCEDURAL ASPECTS OF INTERNATIONAL LAW INSTITUTE AND THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:
STEVEN M. SCHNEEBAUM, ESQ.
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6300

Of Counsel:
HURST HANNUM, ESQ.
HARRY A. INMAN, ESQ.
Procedural Aspects of International Law Institute
1346 Connecticut Avenue, N.W.
Suite 1027
Washington, D.C. 20036
(202) 293-1008

DAVID CARLINER
AMY YOUNG
International Human Rights Law Group
1346 Connecticut Avenue, N.W.
Suite 502
Washington, D.C. 20036
(202) 659-5023

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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INTEREST OF AMICI CURIAE

The Procedural Aspects of International Law Institute is a non-profit organization of international lawyers and scholars, which has consultative status with the United Nations (ECOSOC). Founded in 1965, it has conducted numerous research projects and has published books, monographs, and articles on, *inter alia*, the protection of private rights through international law. It has engaged in research under contract to the United States Departments of Justice and State on such issues as international regulation of narcotics, control of international terrorism, and autonomy and sovereignty in international law. The Institute recently completed a study on linkages between international human rights and U.S. constitutional law.

The International Human Rights Law Group was founded by the Institute in 1978; in 1983 it became a separate, non-profit organization incorporated in the District of Columbia. The Law Group seeks to promote the observance of international human rights norms through providing legal assistance and information to individuals and groups on a pro bono basis; representing clients before international forums; and participating as *amicus curiae* in U.S. litigation involving international human rights norms. The Law Group is counsel to the National Council of Churches in a case concerning the treatment of Haitian refugees by the United States, currently pending before the Inter-American Commission on Human Rights.

As organizations dedicated to the rule of law and to securing compliance with international human rights norms, the Institute and the Law Group believe that the image of the United States, as a nation committed to human rights, would be severely damaged in the eyes of the international community if the decision below is sus-

tained by this Court. For the reasons set out in the following pages, Amici respectfully submit that the opinion of the United States Court of Appeals for the Eleventh Circuit sitting *en banc* was incorrect, and should be reviewed and reversed.

Consent to the filing of this brief has been sought and received from petitioners and the Solicitor General of the United States.

STATEMENT OF THE CASE

This brief is in support of a challenge to the decision of the Eleventh Circuit *en banc* which held that "excludable aliens such as the Haitian plaintiffs have no constitutional rights with respect to their applications for admission, asylum, or parole." *Jean* v. *Nelson*, 727 F.2d 957, 984 (11th Cir. 1984) *(en banc)*, *reversing* 711 F.2d 1455 (11th Cir. 1983). While the *en banc* court recognized that rights may be granted to the plaintiffs by Congress or the Executive branch, it did not properly consider the obligations imposed on the United States either by treaties to which the United States is a party or by customary international law. This failure to consider international law as a source or guarantor of rights is contrary to the mandate of the Supremacy Clause of the United States Constitution, Article VI, Section 2.

The holding of the court below *en banc* leaves undisturbed the findings of the circuit court panel that plaintiffs had presented

> a strong case of discrimination which went essentially unrebutted by the Government. Plaintiffs introduced statistical information based on data provided by the Government, data which showed that class members suffered a grossly disparate impact of the new policy [of detention] . . . The government introduced no evidence of what was actually occurring . . . The government's case therefore consisted of nothing but "mere protestation' and 'arguments of counsel.' These do not constitute rebuttal of a prima facie case of discrimination, especially one as strong as that proven by plaintiffs.

711 F.2d at 1501-02. As to this characterization of the evidence, the *en banc* court noted merely that "[b]ecause the facts of this case have been extensively set forth in the opinions of the panel and the district court, we proceed directly to a discussion of the legal issues involved." 727 F.2d at 962. It is against this factual background of discrimination against Haitians based on their race and/or national origin that the present brief in support of a grant of *certiorari* by this Court is submitted.

Amici offer no opinion as to the circuit court's holding regarding the constitutional rights of plaintiffs under the due process or equal protection clauses of the Constitution. Rather, this Court is urged to grant *certiorari* on the grounds that the circuit court's improper and incomplete consideration of applicable international law represents an impermissible failure to consider legal norms which the Supremacy Clause requires be considered in the context of the present case.[1]

---

[1] The international law issues raised herein were briefed, *inter alia*, in Plaintiffs' Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law at 45-65, *Louis* v. *Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982); in the *en banc* brief of *amici curiae* the Lawyers Committee for International Human Rights and the Immigration Law Clinic, at 14-18; and in the *en banc* reply brief of the Government at 12-14. In any event, this Court has the power to consider relevant issues with a significant bearing on a case even if such issues are not fully presented in the decisions of lower courts. *Vance* v. *Terrazas*, 444 U.S. 252 (1980).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Eleventh Circuit in *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) *(en banc)*, that excludable Haitian asylum applicants have no constitutional, statutory, or other rights to protect them against invidious discrimination on the basis of race and/or national origin, conflicts with clear constitutional provisions, binding precedent of this Court, and the analyses of other Courts of Appeals. The misapplication of international law to which the United States is bound by treaty or custom is in fundamental conflict with applicable decisions of this Court and therefore should be reviewed and reversed.

The United Nations Protocol Relating to the Status of Refugees is a binding treaty which entered into force for the United States in 1968; self-executing provisions of the treaty specifically prohibit discrimination against refugees on the grounds of race or national origin. The Court of Appeals, however, ignored this prohibition by failing to distinguish between refugee and non-refugee plaintiffs in the present case. Even if its broad reading of the discretion available to the Attorney General were correct as of the 1950s, when the primary cases relied upon by the Court of Appeals were decided, such discriminatory discretion was subsequently prohibited by ratification of the Refugee Protocol in 1968 (which was consistent with then-current U.S. practice of non-discriminatory parole).

In addition to the specific prohibition contained in the Refugee Protocol, customary international law which is part of federal common law prohibits discrimination on the basis of race and arbitrary detention based on race and/or national origin. The Court of Appeals panel and the District Court below rejected Government arguments that the detention of Haitians was required because they were a threat to national security, were likely to abscond, or represented an unmanageable flow of entrants; the *en banc* court did not dispute these findings. In such circumstances, the discriminatory treatment, including detention, of the Haitian plaintiffs were arbitrary and thus contrary to binding customary international law.

The unfettered executive branch discretion to discriminate on the basis of race and/or national origin sanctioned by the *en banc* court raises fundamental issues of constitutional law and the role of international law as part of that constitutional scheme which should be reviewed by this Court.

ARGUMENT

This Court Should Grant *Certiorari* To Resolve A Recurring Question Of Constitutional Law As To The Impact Of International Law On The Rights Of Aliens Under The Supremacy Clause Of The Constitution.

The opinion of the *en banc* court below rests on the fundamental proposition that the authority of the Federal Government in the field of immigration and treatment of aliens is so broad that the Haitian plaintiffs can raise no claim of equal protection under the Fifth Amendment's due process clause, even where discrimination on racial or national origin grounds is shown. The primary authority for this proposition appears to be a string of Supreme Court precedents beginning with *Nishimura Ekiu* v. *U.S.*, 142 U.S. 651 (1892), and relying on *Shaughnessy* v. *U.S. ex rel. Mezei*, 345 U.S. 206 (1953), and *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950).

While reference is made to more recent cases, such as *Landon* v. *Plasencia*, 459 U.S. 21 (1982), the authorities

upon which the *en banc* court's analysis principally rests predate both U.S. ratification of the U.N. Protocol Relating to the Status of Refugees ("Refugee Protocol"), *signed* January 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (*entered into force for the United States* November 1, 1968), and the post-World War II development of international human rights norms relating to refugees, discrimination, and detention.

The *en banc* court's opinion is deficient in three major respects:

First, the court makes no distinction between treatment of refugees and that of other non-asylum-seeking excludable aliens, thus totally ignoring the special obligations of the United States toward refugees under the Refugee Protocol, which is the supreme law of the land under the Supremacy Clause of the Constitution.

Second, the court fails to consider relevant international law, both treaty and customary, relating to the issue of discriminatory treatment of aliens based on race and/or national origin.

Third, the court misinterprets current international law which forms part of federal common law and which prohibits prolonged arbitrary detention in the circumstances of the present case.

1. Detention of Haitian refugees based on their race and/or national origin violates self-executing provisions of the UN Protocol Relating to the Status of Refugees and is thus illegal under the Supremacy Clause of the Constitution.

The Refugee Protocol entered into force for the United States in 1968, subsequent to the broad language found in the Court's decisions in *Mezei*, *Knauff*, and *Ekiu*. The Protocol incorporates Articles 2 through 34 of the UN

Convention Relating to the Status of Refugees ("Refugee Convention"), *opened for signature* July 28, 1951; *entered into force* April 22, 1954, 189 U.N.T.S. 137. Article 3 of the Refugee Convention specifically provides, "The Contracting States shall apply the provisions of this Convention to refugees *without discrimination as to race*, religion *or country of origin*." (emphasis added)

Among the provisions which must be applied in a nondiscriminatory manner is Article 31:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . ., enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Under the standards set forth in *Foster* v. *Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829), and subsequently, these provisions set forth self-executing, judicially enforceable obligations which must be applied by federal courts. *See generally* Riesenfeld, *The Doctrine of Self-Executing Treaties* and *U.S.* v. *Postal: Win at Any Price?*, 74 Am. J. Int'l L. 892 (1980).

The panel and district court rejected Government arguments that detention of the Haitians was required because they were a threat to national security, were

likely to abscond, or represented an unmanageable flow of entrants. 711 F.2d at 1492 n. 38; *Louis* v. *Nelson*, 544 F. Supp. 1004, 1006 (S.D. Fla. 1982). But even if it could be shown that detention of plaintiffs in the present case was "necessary" within the terms of Article 31, such restrictions cannot be imposed in a discrimintory manner contrary to Article 3 of the Refugee Convention.

The vast majority of Haitians included in the class of plaintiffs in the present case have applied for refugee status and asylum. Indeed, the *en banc* opinion describes the class as consisting of "Haitian aliens who . . . were detained at various facilities of the Immigration and Naturalization Service (INS) pending a final determination of the merits of their petitions for asylum." 727 F.2d at 961. Refugees (whether or not they may be granted asylum in the United States) have the right to be treated without discrimination on grounds of race or national origin, and this right attaches at the time each becomes a refugee. This is necessarily prior to the date of formal determination of refugee status under domestic law. *See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (Geneva 1979), para. 28, *cited in Matter of Rodriquez-Palma*, 17 I. & N. Dec. 465, 468, (BIA 1980).

No other group of asylum applicants or refugees was detained during the period relevant to the present case. The sole reasons for the detention of plaintiffs were the fact of their Haitian nationality and the fact that nearly every Haitian is black. Such discrimination—which presents an entirely different issue from that which might arise if *all* refugees from *all* countries and of *all* races were detained—is directly contrary to Article 3 of the Refugee Convention.

Even if the *en banc* court is correct in concluding that "the grant of discretionary authority to the Attorney General under 8 U.S.C. § 1182(d) (5) (A) permits the Executive to discriminate on the basis of national origin in making parole decisions." 727 F.2d at 963, such a grant was made through the enactment of the Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163. This purportedly unfettered discretion must fall, at least with respect to refugees, in light of subsequent ratification of the Refugee Protocol by the United States in 1968. *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888). While *Congress* has the power to modify or nullify the self-executing provisions of a treaty through the enactment of subsequent legislation, *Chae Chan Ping* v. *U.S.* (The Chinese Exclusion Cases), 130 U.S. 581 (1889), surely neither low-level I.N.S. officials nor even the Attorney General possess comparable authority to ignore a treaty to which the Senate has given its advice and consent, which the President has duly ratified, and which is binding on the United States under domestic and international law.

The total absence of discussion of the issue of discrimination and the applicability of the Refugee Protocol by the *en banc* court in light of such fundamental and well-settled principles of constitutional law cries out for review. The lower court's obeisance to the plenary power of the Executive without consideration of the restraints imposed by valid, self-executing treaty provisions runs counter to the basic principles of separation of powers enshrined in the Constitution and should be re-examined by this Court.

2. The *en banc* court's failure to consider the impact of customary international norms and treaty law prohibiting discrimination on the grounds of race is contrary to established constitutional law.

As recently as 1983, the Court noted the "frequently reiterated" principle that the federal common law is "necessarily informed . . . by international law principles." *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 103 S. Ct. 2591, 2598 (1983). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Thus, the *en banc* court below was obliged to consider federal common law, as informed by international law, after it had decided that neither constitutional nor statutory law was applicable.

However, apart from a footnote reference to international norms prohibiting arbitrary detention, 727 F.2d at 964 n.4, and a perfunctory observation that "it has been an accepted maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty," *Id.* at 964, the court below fails utterly to address the relevant norms of international law that constitute part of federal common law. In particular, the *en banc* court does not address whether the racial discrimination alleged by plaintiffs falls within the scope of international law which is part of the federal common law.

Customary international law is essentially international common law which informs our own federal common law. It is binding on all nations irrespective of particular treaty obligations, although treaty provisions can offer evidence of the existence of a customary rule, and it is identified by the practice of nations which act in a particular manner because they feel themselves legally bound to so act. This practice of nations may be deduced from treaties, national constitutions, declarations and resolutions of inergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

Under any standard of proof, the prohibition against discrimination by governments on the grounds of race is one of the strongest norms of customary international law.

It is included in such fundamental texts as the Charter of the United Nations, *signed* June 26, 1945, *entered into force* October 24, 1945, 59 Stat. 1031, T.S. No. 993, Article 55(c), and the Charter of the Organization of American States, *signed* April 30, 1948, *entered into force* December 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, Article 3(j), both of which are treaties ratified by the United States. Similar prohibitions are found in every comprehensive international treaty which deals with human rights and in numerous international declarations and resolutions. The American Law Institute also identifies "systematic racial discrimination" as a violation of customary international law binding on all nations. American Law Institute, *Foreign Relations Law of the United States (Revised) ("Restatement")* § 702(f) (Tent. Draft No. 3 1982).

The discrimination against Haitians found by the panel in the present case resulted from official Government acts and policies and, if in fact racially motivated, would clearly fall within this international prohibition. Like its failure adequately to consider the self-executing provisions of the Refugee Protocol, the *en banc* court's failure to assess the international law issues raised by the panel's findings of "a strong case of discrimination" against Hai-

tian plaintiffs constitutes error which should be reviewed by this Court.

3. The *en banc* court's treatment of whether detention of Haitian plaintiffs constituted prolonged arbitrary detention in violation of international law was incomplete, and was based on an incorrect interpretation of Supreme Court precedents.

As noted in section 2, *supra*, the *en banc* court's determination that neither constitutional nor statutory law forbids the discriminatory detention of plaintiffs in this case does not complete the full examination of relevant law it is obliged to undertake. "[I]n an appropriate case, to ascertain what Congress has authorized, one must consider the treaties, agreements, and customary international law to which the United States subscribes, as well as to domestic law." *Palma* v. *Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982).

Prolonged, arbitrary detention is identified in the *Restatement* as a violation of customary international law. *Restatement*, § 702(e). The extent of that prohibition has been explicitly or implicitly considered in, *inter alia*, *Fernandez* v. *Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom. Rodriguez-Fernandez* v. *Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (a Cuban "Freedom Flotilla" entrant as to whom an exclusion order had been entered but whose return would not be accepted by his country of origin cannot be kept in arbitrary, indefinite detention), and *Palma* v. *Verdeyen*, *supra* ("In this appeal, however, the parties have addressed the issues in terms of domestic law."

The *en banc* court's footnote dismissal of the relevance of international law because "amici have pointed to no evidence . . . [to] suggest that it is current international practice to regard the detention of uninvited aliens seeking admission as a violation of customary international law," 727 F.2d at 964 n.4, is improper in several respects. First, it ignores the *Rodriquez-Fernandez* and *Palma* decisions, both of which confirm the relevance of customary international law to the detention of "uninvited aliens." Second, it ignores the discriminatory aspect of the detention, discussed *supra*, and assumes a neutral, all-inclusive detention policy that is at odds with the facts of this case.

Finally, this conclusion of the *en banc* court assumes, without any authority, that the Supreme Court's reference in *Landon* v. *Plasencia*, *supra*, to the power to admit or exclude aliens as "a sovereign prerogative" implies that there have been no significant erosions of "the traditional conceptions of national sovereignty . . . in this area." *Id.* Even assuming *arguendo* the court's unsupported implication that sovereignty *was* unlimited, the entire development of international law since 1945 has eroded "traditional conceptions of national sovereignty," and the treatment by a nation of persons within its jurisdiction is no longer immune from the dictates of international norms. *See, e.g., Guide to International Human Rights Practice* at xii-xiv (Hannum ed. 1984); P. Sieghart, *The International Law of Human Rights* at xix (1983); Leary, *When Does the Impiementation of International Human Rights Constitute Interference into the Essentially Domestic Affairs of a State?—The Interactions of Articles 2(7), 55 and 56 of the U.N. Charter*, in International Human Rights, Law and Practice (Tuttle ed. 1978, American Bar Association).

It also should be noted that the technical distinction in U.S. law between "excludable" and "deportable" aliens is irrelevant under international law, so long as a country exercises effective jurisdiction over the individual con-

cerned. *Cf. Cyprus* v. *Turkey*, European Commission on Human Rights, Apps. Nos. 6780/74 & 6950/75, decision on admissibility of July 10, 1976, 18 Yearbook Eur. Conv. Human Rights (1975). The principle that international human rights law applies to *all* persons is given specific recognition in the Charter of the Organization of American States, a treaty to which the United States is a party, which states, "The jurisdiction of States within the limits of their national territory is exercised equally over all inhabitants, whether nationals or aliens." Charter of the Organization of American States, *signed* April 30, 1948, *entered into force* Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, Art. 14.

The cursory rejection by the *en banc* court of the reasoning of the Tenth Circuit in *Rodriquez-Fernandez* as irreconciliable with *Mezei*, regardless of the development of international human rights law in the intervening 30 years, is unpersuasive and should be reviewed by this Court. Similarly, references to the "plenary authority of the political branches" in the exclusion area, 727 F.2d at 972, ignore basic precepts of the separation of powers, which include oversight by the courts of the Executive's conduct of foreign affairs, and the changing nature of the power of any sovereign nation over those within its jurisdiction. *See* Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Col. L. Rev. 957, 969-74 (1982).

CONCLUSION

The decision of the Court of Appeals *en banc* that the Haitian plaintiffs have no constitutional rights with respect to admission, asylum, or parole and the concomitant implication that they are not "persons" within the ambit of the Fifth Amendment, fly in the face of the universal principle that international human rights law applies to

all persons within a country's jurisdiction, whether citizens or aliens.

In addition, the *en banc* court's failure to consider in a meaningful way the international law issues relevant to this case transgresses the Supremacy Clause of the Constitution and ignores the fundamental role of international law in United States law.

Finally, review by this Court is appropriate in view of the confusion among the circuits in considering international and constitutional law as they apply to aliens in this country. The differences in analysis among *Rodriquez-Fernandez*, *Palma*, and the present case have already been noted. While the Second Circuit held in *Bertrand* v. *Sava*, 684 F.2d 204 (2d Cir. 1982), that the Refugee Protocol affords no rights beyond those granted in domestic law, the same court found a year later that a refugee has a protectable interest under both the Refugee Protocol and statute in not being returned to the country from which he is fleeing. *Yiu Sing Chun* v. *Sava*, 708 F.2d 869 (2d Cir. 1983). Earlier this year, the Second Circuit found that "it appears likely that some due process protection" exists in the context of allegedly inadequate linguistic translations during an asylum hearing for an excludable alien. *Augustin* v. *Sava*, 735 F.2d 32, (2d. Cir. 1984).

This conflict between the Second and Eleventh Circuits, the breadth of the holding and *dicta* in the *en banc* court's opinion, and the clear and uncontradicted finding of discrimination by the panel below, afford an appropriate vehicle for this Court to elucidate guidelines for future cases.

In light of the important and recurring issues of international law and separation of powers raised by the pres-

ent case, *amici* respectfully urge this Court to grant *certiorari*.

Respectfully submitted,

HARRY A. INMAN,
HURST HANNUM, ESQ.
Procedural Aspects of
International Law Institute
1346 Connecticut Avenue, N.W.
Suite 1027
Washington, D.C. 20036
(202) 293-1008

*DAVID CARLINER, ESQ.
AMY YOUNG, ESQ.
International Human Rights
Law Group
1346 Connecticut Avenue, N.W.
Suite 502
Washington, D.C. 20036
(202) 659-5023
**Counsel of Record*

Of Counsel:
STEVEN M. SCHNEEBAUM, ESQ.
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6300

OPPOSITION

BRIEF

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No. 84-5240

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL., PETITIONERS

v.

ALAN C. NELSON, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

BARBARA L. HERWIG
MICHAEL JAY SINGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

3100

QUESTION PRESENTED

Whether petitioners, a class of excludable Haitian aliens seeking admission to the United States, may invoke the Fifth Amendment to challenge the Attorney General's exercise of his authority to parole unadmitted aliens into this country pending a determination of their admissibility.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A34) is reported at 727 F.2d 957. The prior opinion of the panel (Pet. App. A35-A90) is reported at 711 F.2d 1455. The opinions of the district court (Pet. App. A93-A124, A131-A143) are reported at 544 F. Supp. 973 and 532 F. Supp. 881.

JURISDICTION

The judgment of the court of appeals (Pet. App. A156) was entered on February 28, 1984. A petition for rehearing was denied on May 4, 1984 (Pet. App. A158). The petition for a writ of certiorari was filed on August 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment and 8 U.S.C. 1182(d)(5)(A) are set forth at Pet. 2-3.

STATEMENT

1. a. Section 235(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225(b), provides that "[e]very alien * * * who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer." Section 212(d)(5)(A) of the Act, 8 U.S.C. 1182(d)(5)(A), authorizes the Attorney General, "in his discretion," to parole into the United States any alien applying for admission "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." The statute makes clear, however, that such parole "shall not be regarded as an admission of the alien" and that the alien shall be returned forthwith to custody when, "in the opinion of the Attorney General," the purposes of the parole have been served.

b. In February 1981, a Select Committee on Immigration appointed by President Carter issued a report that concluded that an immigration crisis exists in the United States (Pet. App. A99). A principal reason for the crisis was that illegal aliens were routinely released prior to hearings on their applications for admission; as a result, further illegal immigration was encouraged (*id.* at A98-A99 & n.17) and aliens often failed to appear at their hearings (Tr. 2399).[1] See also Report by the General Accounting Office, *Detention Policies Affecting Haitian Nationals* 15 & n.4 (June 16, 1983) (hereinafter GAO Rep.).

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[1] "Tr." refers to the trial transcript.

In March 1981, President Reagan appointed a special cabinet-level task force, presided over by the Attorney General, to consider solutions to this pressing problem. The task force developed several policy proposals in response to the continuing illegal immigration problem, including a recommendation that the government return to a general policy of detaining incoming aliens who cannot support their claims for admission to this country (Pet. App. A99-A100). This policy of detention had been routinely followed by the government during the 1940s and early 1950s but had been largely abandoned since 1954, when the Attorney General began exercising his parole authority more broadly to allow undocumented aliens to remain at large within our borders pending appropriate immigration proceedings (*id.* at A100 n.18).

On July 30, 1981, the President issued a statement on the nation's immigration policy, emphasizing the need to "establish control over immigration" and indicating that the Attorney General would be taking measures to ensure that aliens would be admitted to our nation " 'in a controlled and orderly fashion . . .' " (Pet. App. A100). On the same day, the Attorney General testified before a joint hearing of the Senate and House subcommittees with jurisdiction over immigration and refugee policy. He advised Congress of the severe problems in the immigration area, noting that the nation has " 'lost control of [its] borders,' " has " 'pursued unrealistic policies' " and has " 'failed to enforce [its] laws effectively' " (*ibid.*). He further testified that the government's effort to regulate the entry of aliens has " 'crumbled under the burden of overwhelming numbers,' " and he stressed the " 'necessity of detaining illegal aliens pending exclusion' " (*ibid.*).

A key part of the new immigration policy recommended by the task force, approved by the President, and announced by the Attorney General "called for more restrictive use of

parole and increased use of detention" (Pet. App. A100). The Immigration and Naturalization Service (INS) implemented this "new" policy (which in many ways was a return to the "old" pre-1954 policy embodied in the Immigration and Nationality Act) by issuing "general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission" (*id.* at A101).[2] By July 31, 1981, then, the "new" policy of more restrictive use of parole was initiated with respect to excludable aliens generally, including those arriving from Haiti (*ibid.*). See also GAO Rep. 15-16.

2. This action was initially brought as a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida on June 10, 1981 (Pet. App. A133, A152). An amended petition was filed on June 16, 1981, along with a complaint for declaratory, injunctive, and mandatory class action relief (*ibid.*). The complaint, which was amended on August 24, 1981, asserted seven causes of action, including a claim that respondents had discriminated against petitioners on the basis of race and national origin, in violation of the Fifth Amendment, by treating Haitian refugees differently from other refugee groups in connection with their detention and other matters relating to their applications for admission.

On September 30, 1981, the district court granted petitioners' motion for class certification and converted a temporary restraining order into a preliminary injunction

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[2]An "excludable" alien is an alien subject to exclusion under the Immigration and Nationality Act who has been stopped by INS officials at the border and who therefore has not effected an entry into the United States. A "deportable" alien, by contrast, is one who has managed to enter the United States, legally or otherwise, and is, by virtue of such entry, no longer subject to exclusion proceedings but only to deportation proceedings. See, *e.g.*, *Leng May M[illegible] v. Barber*, 357 U.S. 185, 187 (1958).

barring the government from proceeding with exclusion hearings against members of the class (Pet. App. A144-A150; 530 F. Supp. 924). As later modified (Pet. App. A134 (footnote omitted); see also *id.* at A5 n.2, A104, A126), the certified class

> consists of all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either: (1) unrepresented by counsel; or (2) represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association. [3]

On February 24, 1982, the district court dismissed much of petitioners' complaint on jurisdictional grounds (Pet. App. A131-A143). All that remained of petitioners' claims were the following (*id.* at A139): (1) Count II, which alleged that the government's change of parole policy was unlawful because it was not accomplished in accordance with the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA), 5 U.S.C. 553; (2) Count IV insofar as it alleged a First Amendment right of access by detained Haitians to persons not in detention and by the Haitian Refugee Center, Inc., to persons in detention; and

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[3]In its final judgment, the district court further modified the class certification by enlarging the class to include detained Haitians for whom a counsel's notice of appearance form (G-28) had been entered (Pet. App. A130). The court earlier had modified the preliminary injunction to allow the government to proceed with exclusion hearings for those petitioners who were represented by counsel, but the modified injunction provided that no final order of exclusion could be entered against such petitioners without prior notice to the district court (*id.* at A135 n.6).

(3) Count VII insofar as it challenged the new parole policy as discriminating on the basis of race and national origin, in alleged violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

3. Following a trial, the district court issued its decision on June 18, 1982 (Pet. App. A93-A124). The court ruled in favor of petitioners on the APA claim, holding that the government's revised parole policy should have been promulgated in accordance with the notice-and-comment rulemaking requirements (*id.* at A113-A117). The court reserved judgment on the First Amendment claims, suggesting that they might become moot depending on the type of relief to be awarded (*id.* at A117 n.49). On the discrimination claim, however, the court held that the government did not violate the equal protection component of the Fifth Amendment's Due Process Clause (*id.* at A117-A122, A124).

With respect to the discrimination claim, the district court found, after careful consideration of the voluminous factual record (including live testimony during a six-week trial) that "[t]he policies and practices challenged herein, including detention, were proposed to and approved by the President of the United States in the context of developing a comprehensive new immigration policy" (Pet. App. A121). "These measures were intended to be applied to all aliens regardless of their race or national origin" (*ibid.*). The court found that the revised parole policy was "designed to deal with another Mariel type situation, regardless of the nationality or number of the arriving aliens" (*id.* at A101). As matters turned out, for a variety of reasons, "Haitians are impacted to a greater degree by the new detention policy than aliens of any other nationality at the present time" (*id.* at A120). But the court found that the policy was "intended to be fair and * * * if another class of aliens arrived in this

country in a situation similar to that of the [petitioners] they would be treated in a similar fashion" (*id.* at A122; footnote omitted).

Addressing the statistical evidence adduced by petitioners to show that Haitians were disproportionately affected by the government's revised parole policy, the district court concluded that such evidence "does not deserve much weight in determining the merits of [petitioners'] discrimination claim" (Pet. App. A102). The court noted that the statistical method employed by petitioners' expert was designed to test the probability that a particular result could have come about in a random manner, but that "[p]arole is not a random process and the probability of parole is not the same for every person" (*ibid.*). The statistician's analysis failed to take many relevant factors into account, such as the alien's age and health, the alien's reasons for seeking parole, the pendency of an asylum request by the alien, or the presence of a minor with the alien. Indeed, the only factor that the expert analyzed with respect to parole criteria was documentation. And even with respect to documentation, the expert's purported controls were "far too simplistic because they did not distinguish between the types of documents and the facial validity thereof" (*ibid.*). In short, the court found that the evidence "simply did not establish the existence of a statistically significant relationship between being detained and being Haitian in the context of similarly situated individuals" (*ibid.*).

On the ultimate factual question whether the challenged immigration policy was motivated by an invidiously discriminatory purpose in violation of the Fifth Amendment, the court found that petitioners failed to establish that respondents intended to discriminate against petitioners on the basis of race or national origin; accordingly, the court rejected petitioners' Fifth Amendment claim (Pet. App.

A121-A122). The district court summarized its factual finding as follows (*id.* at A124):

> [Petitioners] have failed to prove by a preponderance of the evidence that they were incarcerated because of their race and/or national origin. The evidence shows that the detention policy was not directed at [petitioners] because they were black and/or Haitian, but because they were excludable aliens unable to establish a prima facie claim for admission and that non-Haitians were detained pursuant to this policy as well. The mere fact that more Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminatory. Regardless of its ultimate impact, the policy was intended to be applied and was in fact applied equally to all similarly situated aliens regardless of their race and/or national origin.

Following a hearing concerning the relief to be ordered in this case, the district court issued its final judgment on June 29, 1982 (Pet. App. A125-A130; 544 F. Supp. 1004). In view of its holding that the government's revised parole policy was not promulgated in accordance with APA rulemaking procedures, the court declared that the new policy was "null and void" and that the prior policy was thereby restored to "full force and effect" (Pet. App. A127). Accordingly, the court ordered that any petitioners in detention were to be released on parole under an interim plan, subject to certain terms and conditions (*id.* at A127-A130). The district court further determined that, in light of the relief awarded, the First Amendment access claims had become moot (*id.* at A126 n.2).

On June 30, 1982, the district court refused to stay the requirement that petitioners be released from detention; on July 2, however, the court granted a partial stay, authorizing future detention of excludable aliens if parole is refused

in accordance with a properly promulgated regulation. On July 13, 1982, the court of appeals also denied the government's request to stay that portion of the district court's order requiring release of petitioners from detention (Pet. App. A91-A92; 683 F.2d 1311). As a result, petitioners were released from detention, but subsequent arrivals have been detained in accordance with the new parole regulations, which have been codified at 8 C.F.R. 212.5 (Pet. App. A6).

4. Respondents appealed from the district court's adverse APA ruling. Petitioners cross-appealed on their Due Process and First Amendment claims as well as on two other claims that previously had been dismissed on jurisdictional grounds.[4]

a. A panel of the court of appeals ruled for petitioners in all but one respect (Pet. App. A35-A90). The panel affirmed the district court's judgment with regard to the APA claim, although it adopted a different rationale for its decision (*id.* at A54-A63). On the other hand, the panel reversed the district court's judgment in favor of respondents on the Fifth Amendment discrimination claim, concluding that the district court's extensive findings of fact on this complex matter were clearly erroneous (*id.* at A63-A82). In this connection, however, the panel observed that, although petitioners "consistently have addressed this case as one premised both on nationality (Haitian) and race (black) [,] [t]he bulk of the evidence * * * was addressed to the nationality claim" (*id.* at A65-A66 n.29). Accordingly, the panel

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[4]These additional claims presented the following questions: (1) whether individuals appearing for a preliminary inspection at the border are entitled to counsel and to notice of their right to counsel, and (2) whether INS must give notice to these individuals of their right to apply to the INS district director for political asylum.

discussed the equal protection claim in terms of nationality-based discrimination, and framed its order of relief in terms of "ensur[ing] that all aliens, regardless of their nationality or origin, are accorded equal treatment" (*id.* at A89-A90; footnote omitted).[5]

5. The court of appeals granted the government's petition for rehearing en banc (714 F.2d 96 (11th Cir. 1983)), thereby vacating the panel opinion (see 11th Cir. R. 26(k)).

The en banc court of appeals dismissed in part, reversed in part, and remanded (Pet. App. A1-A34). The court unanimously dismissed the APA claim as moot (*id.* at A6, A28, A30). With respect to the equal protection claim, the court held that petitioners, as excludable aliens, were not entitled to invoke the Fifth Amendment to challenge the government's refusal to grant them parole (*id.* at A6-A19, A28). Because "the decision to parole or detain is an integral part of the admissions process" (*id.* at A7; see also *id.* at A13-A16), the court of appeals concluded that petitioners' claim was controlled by the well-settled rule that "[a]liens seeking admission to the United States * * * have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress" (*id.* at A12).

[5]The panel also held that the district court had erred in dismissing petitioners' claim concerning notification of their right to seek asylum before the INS district director (Pet. App. A82-A87). The panel did, however, sustain the district court's "discretion in dismissing the [notification of a right to] counsel claim as unexhausted" (*id.* at A86). Proceeding to the merits of the asylum claim, the panel held that the Fifth Amendment requires that excludable aliens such as petitioners be notified of their constitutionally protected right to seek asylum before the INS district director, and that the government violated this constitutional right (*id.* at A87-A88).

Finally, the panel concluded that the First Amendment claim of the non-class petitioner, the Haitian Refugee Center, Inc., to a right of access to the detained class petitioners was not moot (Pet. App. A88). The panel sustained this "purely legal claim of a right to solicit clients in detention" (*ibid.*), and "remand[ed] this issue for review of the government's access restrictions in light of the principles enunciated herein" (*id.* at A89).

The court of appeals further observed "that the grant of discretionary [parole] authority to the Attorney General under 8 U.S.C. § 1182(d)(5)(A) permits the Executive to discriminate on the basis of national origin in making parole decisions" (Pet. App. A7; see also *id.* at A22).[6] The court, however, accepted the government's position that, as found by the district court, the restrictive parole policy does not discriminate on the basis of national origin (*id.* at A7, A22). The court nevertheless concluded that it was necessary to remand this matter to the district court to consider "whether the actions of lower-level officials in the field conform to the policy statements of their superiors in Washington" (*id.* at A22; see also *id.* at A7). In this connection, the district court was instructed to "conduct such proceedings as are necessary to determine whether there exists a facially legitimate and bona fide reason for the government's decision to deny parole to the class members presently in detention" (*id.* at A22).[7]

[6]In a separate concurring and dissenting opinion (Pet. App. A30-A34), four members of the court of appeals took exception to the majority's view regarding the Executive's authority to draw nationality-based distinctions in the immigration context (*id.* at A31-A33).

[7]Judge Tjoflat, who joined the majority opinion in all other respects, dissented with regard to the scope of review on remand (Pet. App. A28-A30). In his view, "the district court on remand should confine itself to asking the Attorney General to justify in the appropriate manner the actions undertaken by him or his department" (*id.* at A30). On the other hand, the four members of the court of appeals who joined in a separate concurring and dissenting opinion agreed that the case should be remanded for consideration of the non-constitutional abuse-of-discretion questions, and expressed no objection to the standard of

ARGUMENT

The en banc court of appeals correctly held that excludable aliens may not invoke the Fifth Amendment to challenge matters relating to their applications for admission to the United States, including the denial of parole pending a determination of their admissibility. That holding is fully consistent with a long line of precedent in this Court, and it creates no conflict with the decision of any other court of appeals. Moreover, contrary to the repeated assertions of petitioners and amici, the record in this case does not demonstrate that petitioners were denied parole as a result of invidious discrimination on the basis of race or national origin. Indeed, the district court found that petitioners had failed to establish intentional discrimination and that finding was not disturbed by the en banc court of appeals. Furthermore, with regard to the question whether lower-level INS officials abused their discretion by acting contrary to a facially neutral detention policy, the case is in an

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review specified by the majority (*id.* at A30-A31). Thus, the full court of appeals was unanimous in its decision to remand this case for consideration of whether low-level INS officials abused their discretion in the exercise of parole authority, although one member of the court would have adopted a narrower standard of review.

With regard to the question whether petitioners have a constitutional right to receive notice of their statutory right to seek asylum, the en banc court of appeals agreed with the panel that the court had jurisdiction to reach this issue (Pet. App. A23-A24). Contrary to the panel, however, the en banc court held that there is no such constitutional right to notice (*id.* at A25-A27). The four-member concurring and dissenting opinion dissented from this holding on the asylum notice issue (*id.* at A33-A34). This issue is not presented by the petition.

Finally, the en banc court of appeals unanimously held that the First Amendment access claim of petitioner Haitian Refugee Center, Inc., was not moot but could not be evaluated properly on the record on appeal (Pet. App. A27). Accordingly, the court remanded this matter to the district court for further consideration following development of an adequate factual record (*id.* at A27-A28). This issue also is not presented by the petition.

interlocutory posture. The court of appeals has directed the district court to consider this nonconstitutional issue for the first time on remand. In these circumstances, this case does not warrant review by this Court.

1. a. From its very first examination of the federal government's exclusion power nearly a century ago, this Court has consistently sustained the plenary authority of the Legislative and Executive Branches to establish and implement the substantive and procedural rules governing admission to the United States without judicial intervention. See *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892). Although "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law" (*Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)), aliens who have not been admitted to this country are governed by a different constitutional rule. "[A]n alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' " *Ibid.* (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)). See also *Nishimura Ekiu* v. *United States*, 142 U.S. at 660.

The critical distinction between aliens who have gained entry to the United States and those who have not is ingrained in our law. As the Court observed in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958):

> [O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the

former category who are merely "on the threshold of initial entry."

Accordingly, the Court held in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 600 (1953) (emphasis added), that an immigration regulation denying a hearing on an order of permanent exclusion "raises no constitutional conflict if limited to 'excludable' aliens *who are not within the protection of the Fifth Amendment.*" Recently, the Court reiterated this principle: "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has *no constitutional rights regarding his application*, for the power to admit or exclude aliens is a sovereign prerogative. Our recent decisions confirm that view." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) (citations omitted; emphasis added).

It is undisputed that the Haitian petitioners in this case have not been admitted into the United States and fall within the category of "excludable" aliens (Pet. App. A13, A104, A118).[8] Thus, under the settled principles discussed above, petitioners have "no constitutional rights regarding [their] application[s]" for admission. *Landon* v. *Plasencia*, 459 U.S. at 32.

b. Petitioners contend that these settled principles do not govern this case because they invoke the Fifth Amendment not with respect to their applications for admission but,

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[8]See also 8 U.S.C. 1182(d)(5)(A) (grant of parole "shall not be regarded as an admission of the alien"); 8 U.S.C. 1182(a) (defining general classes of excludable aliens); 8 U.S.C. 1223(a) (removal of alien from vessel or aircraft for examination by immigration official "shall not be considered a landing"). The Court has long recognized that an unadmitted excludable alien's status is not affected by his physical presence within the territorial boundaries of the United States; "he is treated as if stopped at the border" (*Mezei*, 345 U.S. at 215). See also, *e.g.*, *Leng May Ma* v. *Barber*, 357 U.S. at 188; *Nishimura Ekiu* v. *United States*, 142 U.S. at 661.

instead, with respect to their applications for parole and consequent release from detention pending a determination of their admissibility (Pet. 19 & n.15).[9] See also NAACP Amicus Br. 16-19. But the statutory command to detain "for further inquiry" every alien not "clearly and beyond a doubt entitled to land" (8 U.S.C. 1225(b)) and the statutory discretion to parole unadmitted aliens into the United States only "for emergent reasons or for reasons deemed strictly in the public interest" (8 U.S.C. 1182(d)(5)(A)) are inextricably related and incident to the process of determining whether to admit or exclude aliens arriving at our borders. Indeed, the Attorney General's discretionary parole authority may be exercised only with respect to an "alien applying for admission to the United States" (*ibid.*).[10] The Attorney General's exercise of his authority to release an alien from detention and parole him into the United States "permit[s] the physical entry of the alien into the midst of our society and implicates many of the same considerations — such as employment and national security concerns — that justify restrictions on admission" (Pet. App. A15-A16).

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[9]Indeed, petitioners do "*not* challenge any decision or the authority of the Congress, the President or even the Attorney General in matters concerning admission of aliens into the country or the right to make distinctions based upon race or national origin in the ultimate decision to admit or exclude aliens." Pet. 15 n.8 (emphasis in original).

[10]All of the Haitian petitioners are, by the definition of their certified class, excludable aliens "who are applying for entry into the United States" (Pet. App. A126). The only basis for admission suggested by petitioners throughout this litigation is their desire to be granted asylum in this country. If the Attorney General determines that an alien is a "refugee" within the meaning of 8 U.S.C. 1101(a)(42)(A), the alien may be granted asylum, released from custody, and allowed to be physically at large within the United States. Merely applying to an immigration judge for asylum will be treated as a request for withholding exclusion under 8 U.S.C. 1253(h) and will cause the exclusion proceeding to be adjourned. See 8 C.F.R. 208.3(b), 208.10(b). Indeed, an exclusion proceeding that has already been concluded may be reopened on the basis of a request for asylum. 8 C.F.R. 208.11.

In any event, this Court has expressly recognized that "detention, or temporary confinement" is "part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens." *Wong Wing* v. *United States,* 163 U.S. 228, 235 (1896). "Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation" (*ibid.*). See also *Carlson* v. *Landon,* 342 U.S. 524, 538 (1952) (recognizing detention as part of the process of determining an alien's right to be in this country); *Palma* v. *Verdeyen,* 676 F.2d 100, 104 (4th Cir. 1982) (recognizing implicit power of Attorney General to detain excludable alien indefinitely, rather than grant parole, in conjunction with exclusion process).

Moreover, as the en banc court of appeals observed (Pet. App. A13-A15), this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei, supra,* is directly on point. The issue in *Mezei* was "whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad" (345 U.S. at 207). *Mezei* "did not concern admission or exclusion *per se,* but the rights of an alien when challenging his continued detention pending the enforcement of an exclusion order that has been entered against him" (Pet. App. A14). It follows, therefore, that the holding of *Mezei* — that excludable aliens may not invoke the Fifth Amendment in the exclusion context — "clearly is not limited to challenges relating to the admission decision itself" (*ibid.*; footnote omitted).[11]

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[11]Petitioners' strenuous efforts to distinguish or discredit *Mezei* (Pet. 20-23) are thus unpersuasive. See also NAACP Amicus Br. 13-16; American Immigration Lawyers Association Amicus Br. 1-4. As the court of appeals concluded (Pet. App. A15 n.16): "Although there are obviously some factual differences between [this case and *Mezei*], the similarity between the nature of the claims presented and the legal status of the [petitioners] is sufficient to conclude that *Mezei* is controlling."

2. Petitioners would have this Court believe, and they repeatedly and unabashedly assert, that this case "comes to this Court with a clear and irrefutable record of invidious race and national origin discrimination against the petitioners, which was not challenged by the *en banc* court" (Pet. 15; footnote omitted). See also, *e.g.,* Pet. 3, 4, 12; NAACP Amicus Br. 3 & n.2, 4. They maintain that "[t]he * * * factual findings of invidious discrimination made by a panel of the Eleventh Circuit * * * were undisturbed by the *en banc* court" (Pet. 3 n.1; citations omitted). Indeed, the reasons that petitioners advance in support of review by this Court are almost entirely predicated on this representation.

Petitioners are completely mistaken in this regard. As detailed above (see pages 6-8, *supra*), following a six-week trial at which numerous exhibits and extensive live testimony were presented, the district court found that the government did not discriminate against petitioners on the basis of race or national origin (Pet. App. A121-A122, A124). On appeal before the panel, the court of appeals concluded that the district court's factual finding on this point was clearly erroneous insofar as nationality-based discrimination was concerned (*id.* at A74). With regard to petitioners' claim of racial discrimination, however, the panel simply noted that "[t]he bulk of the evidence * * * was addressed to the nationality claim" (*id.* at A65-A66 n.29), and the panel's decision — including its award of relief (*id.* at A89-A90) — accordingly was confined to the alleged discrimination on the basis of national origin.

Moreover, the panel's treatment of this issue is entirely irrelevant, because, in granting rehearing en banc, the full

court of appeals vacated the panel decision, thereby rendering that opinion entirely void of any precedential force. See *Jean* v. *Nelson,* 714 F.2d 96 (11th Cir. 1983); 11th Cir. R. 26(k). Thereafter, the en banc court did not disturb the detailed factual findings of the district court. Indeed, the en banc court accepted the government's position, as found by the district court, that the restrictive parole policy was not designed to discriminate against any aliens on the basis of nationality (Pet. App. A7, A22).[12] The en banc court nowhere addressed the question of discrimination on the basis of race, presumably because that matter was resolved in the government's favor by the district court and was no longer at issue.

Thus, contrary to petitioners' egregious misrepresentations, this case most assuredly does not come to this Court on a finding of government discrimination on the basis of race and nationality. To obtain such a finding, petitioners would first have to show, and this Court would have to conclude, that the district court's factual finding of nondiscrimination was clearly erroneous (see, *e.g., Pullman-*

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[12]The en banc court stated in dictum that the parole statute "permits the Executive to discriminate on the basis of national origin in making parole decisions" (Pet. App. A7; see also *id.* at A22 & n.30). Petitioners regard this dictum as "harmful" (Pet. 18 n.14). But, in point of fact, the Attorney General and INS have long drawn distinctions among aliens on the basis of nationality. See, *e.g.,* 8 C.F.R. 101.1 (presumption of lawful admission for certain national groups); 8 C.F.R. 212.1 (documentary requirements for nonimmigrants of particular nationalities). And the courts have found no occasion to disturb this administrative practice. See, *e.g., Saxbe* v. *Bustos,* 419 U.S. 65 (1974) (approving administratively created special status for Mexican and Canadian commuters despite absence of express authorization for this nationality-based distinction). Indeed, the courts have consistently held that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive." *Narenji* v. *Civiletti,* 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 947 (1980) (regulation requiring Iranian students to report on their current status).

Standard v. *Swint,* 456 U.S. 273 (1982)) — an issue not even raised by petitioners.[13]

In any event, the equal protection claims of the petitioners who were in detention when the trial record was developed in this case are now largely moot. As noted by the en banc court, "the government is no longer detaining any class members except pursuant to the new regulations," and the validity of these regulations is not at issue here (Pet. App. A6). The formerly detained class members have no cause to complain, because they have been paroled pursuant to the district court's release order.[14]

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[13]Petitioners' rendition of the facts of this case mistakenly and misleadingly relies not only on the panel's findings but also on the preliminary findings of the district court upon converting a temporary restraining order into a preliminary injunction (see Pet. 4, 8 n.4, 9-10; Pet. App. A144-A150). The district court's findings at that early stage of this proceeding were not based on an adversarial evidentiary hearing, and reliance on those findings at this stage is entirely inappropriate in light of the lengthy trial record and district court findings now available.

[14]Petitioners' contention that their challenge has all along been aimed at low-level INS enforcement officials who allegedly have discriminated in contravention of high-level officials' policies (see, *e.g.,* Pet. 4, 11 n.6, 18) comes as a complete surprise, especially since petitioners have named the Attorney General and the Commissioner of INS in their complaint (see Pet. ii). As we have heretofore understood petitioners' challenge, they have contended that high-level INS officials had themselves designed a discriminatory parole policy and that the local enforcement officials had merely been following instructions. See, *e.g.,* Pretrial Stipulation 5; 5/14/82 Tr. 84, 133-137, 153-157, 171-172; 5/18/82 Tr. 143; Petitioners' Opening Panel C.A. Br. 6-10. Petitioners' sudden shift in position presumably has been influenced by the en banc court's analysis of this case, and by the remand to consider "whether the actions of lower-level officials in the field conform to the policy statements of their superiors in Washington" (Pet. App. A22). This remand renders this case even less suitable for review because it underscores the interlocutory posture of the case.

3. Petitioners further contend that the decision in this case creates a conflict with decisions of this Court and of other courts of appeals (Pet. 23-27; see also NAACP Amicus Br. 7-10). This contention is without merit.

In their strained attempt to find a conflict with other decisions, petitioners have completely mischaracterized the holding of the en banc court. They imply that the en banc court has ruled that excludable aliens are not "persons" under the Fifth Amendment and are therefore not entitled to constitutional protection under any circumstances (Pet. 23-25). To the contrary, however, the en banc court expressly recognized that "there are certain circumstances under which even excludable aliens are accorded rights under the Constitution" (Pet. App. A16); and it explained why this case, involving a challenge by excludable aliens to matters relating to their applications for admission, differs from the other cases on which petitioners rely (see *id.* at A16-A19).

For example, *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931), cited by petitioners (Pet. 24-25), involved application of the Fifth Amendment to protect foreign nationals from an unlawful taking by the federal government. As the en banc court pointed out, that decision is readily "distinguished because it clearly does not implicate the powers of the national government over immigration" (Pet. App. A17).

Furthermore, cases like *Wong Wing* v. *United States*, *supra*, and *United States* v. *Henry*, 604 F.2d 908 (5th Cir. 1979), also relied on by petitioners (Pet. 25 & n.21), are similarly inapposite. In those cases, the aliens were subjected to criminal prosecution and punishment by the government, thereby entirely changing the context in which the government's authority over the aliens was being exercised. "From that point forward any action taken by the

government derived not from its power to control admission to this country, but from the powers of the Executive over law enforcement" (Pet. App. A17).[15]

Petitioners also cite (Pet. 25 n.21) two cases in which aliens were permitted to challenge allegedly unconstitutional government action abroad, where the government sought to exploit the fruits of its allegedly unlawful conduct in criminal procedings. See *United States* v. *Demanett*, 629 F.2d 862 (3d Cir.), cert. denied, 450 U.S. 910 (1980); *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974). Again, as in *Wong Wing* and *Henry*, this criminal prosecution context readily distinguishes these cases and renders them inapplicable to the immigration issue presented here.[16]

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[15]Moreover, the aliens involved in *Wong Wing* were not stopped at the border (and thus excludable), but rather were apprehended after they had already managed to enter the country illegally (and thus were deportable). Nevertheless, the en banc court declined to distinguish *Wong Wing* on this ground because the court "believe[d] that its basic principle — that criminal punishment may not be imposed without due process protection — is relevant to excludable aliens" (Pet. App. A17 n.22), as reflected in the Fifth Circuit's decision in *Henry*.

[16]Petitioners' reliance (Pet. 25 n.21) on *Rodriguez-Fernandez* v. *Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), is also misplaced. That case is readily distinguishable as involving "an alien against whom an exclusion order had already been entered and who was clearly unable to return to his country of origin" (Pet. App. A18; footnote omitted). Indeed, *Rodriguez-Fernandez* actually supports the en banc court's holding that an excludable alien has no Fifth Amendment right to challenge his detention pending determination of his admissibility. The Tenth Circuit's further holding, that the Constitution does apply once the exclusion process has concluded without provision for deportation, has no bearing on the Haitian petitioners in this case, who will be able to return to Haiti if a final order of exclusion is entered (see Pet. App. A18 n.26). The en banc court nevertheless expressed its disagreement with the Tenth Circuit's analysis of this issue (*id.* at A18-A19), but the court's observations were not necessary to the disposition of this case and do not create a conflict between the circuits requiring resolution by this Court.

Finally, petitioners point to two recent decisions of the Second Circuit in the hope of finding a conflict that merits this Court's attention (Pet. 26-27). See *Augustin* v. *Sava*, 735 F.2d 32 (1984); *Yiu Sing Chun* v. *Sava*, 708 F.2d 869 (1983). Both cases, however, are easily distinguished.

Yiu Sing Chun presented the question whether alien stowaways seeking political asylum were entitled to a hearing before an immigration judge after their asylum applications had been denied by the INS district director. The court of appeals resolved this question in favor of the aliens on the basis of the relevant statutory and regulatory provisions. The court, however, gratuitously added the observation that a refugee's "interest in not being returned [to his homeland] may well enjoy some due process protection not available to an alien claiming only admission" (708 F.2d at 877).

Augustin concerned an alien's petition for a writ of habeas corpus on the ground that his asylum hearing, which was not translated into his language, did not afford him an adequate opportunity to present his claim. The court of appeals ruled in the alien's favor, indicating that he "was denied procedural rights protected by statute and INS regulations and very likely by due process as well * * *" (735 F.2d at 38).

In neither case did the Second Circuit squarely rest its decision on an excludable alien's constitutional right to due process. Indeed, in both cases, the court's references to due process considerations are fairly characterized as dicta, since the actual holdings rested on various statutory and regulatory provisions and not on the Constitution. Moreover, the factual contexts of those two cases differ considerably from that of this case, which concerns the denial of parole pending determination of an excludable alien's

admissibility.[17] In short, the two Second Circuit cases relied on by petitioners are not in conflict with the decision below.[18]

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[17]Indeed, in a case closely resembling the factual context of this one, the Second Circuit held that a local INS official did not abuse his discretion in denying parole to excludable Haitian aliens pending a determination of their admissibility. See *Bertrand* v. *Sava*, 684 F.2d 204 (1982). The decision of the en banc court in this case, far from creating a conflict with the Second Circuit, closely follows and expressly relies on the reasoning and holding of the Second Circuit in *Bertrand*. See Pet. App. A7, A19-A20, A21, A22.

[18]One of the amicus briefs submitted to this Court (see Brief of Amici Curiae The Procedural Aspects of International Law Institute, et al. [hereinafter PAILI Amicus Br.]) requires comment. Amici urge this Court to grant review on an issue not presented by petitioners — *i.e.*, that the en banc court did not give proper consideration to applicable principles of international law (PAILI Amicus Br. 3). Although we need not respond to this contention because the Court will consider only "the questions set forth in the petition" (Rule 21.1(a) of the Rules of this Court), we nevertheless note that the en banc court did give adequate consideration to amici's contentions and found no evidence of any international law violation (see Pet. App. A8 n.4).

Moreover, this Court's recent decision in *INS* v. *Stevic*, No. 82-973 (June 5, 1984), further undercuts amici's reliance on the 1968 United Nations Protocol Relating to the Status of Refugees. As *Stevic* recognized, the accession by the United States to the Protocol "did not work a substantial change in the law" (slip op. 20 n.22). See also *Bertrand* v. *Sava*, 684 F.2d at 218-219; *Pierre* v. *United States*, 547 F.2d 1281, 1288-1290 (5th Cir.) (en banc), vacated and remanded to consider mootness, 434 U.S. 962 (1977).

In addition, amici's arguments are fundamentally flawed because they are premised on the mistaken view that this case comes to the Court on a record of government discrimination on the basis of race and national origin. As explained above (see pages 17-19, *supra*), however, the undisturbed factual findings of the district court show, to the contrary, that the government's restrictive parole policy applies nondiscriminatorily to all similarly situated excludable aliens, regardless of race or national origin (see Pet. App. A117-A122, A124).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

BARBARA L. HERWIG
MICHAEL JAY SINGER
Attorneys

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REPLY

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL.,

Petitioners,

vs.

ALAN NELSON, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Counsel:
BRUCE J. WINICK, ESQ.
IRWIN P. STOTZKY, ESQ.
CHRISTOPHER KEITH HALL, ESQ.
MICHAEL ROSEN, ESQ.

Counsel of Record:
IRA J. KURZBAN, ESQ.
KURZBAN, KURZBAN, & WEINGER, P.A.
Suite 901
700 Brickell Avenue
Miami, Florida 33131
Tel: (305) 371-0268

Of Counsel:
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
One New York Plaza
New York, New York 10004
(212) 820-8000
BY: ROBERT E. JUCEAM, ESQ.
TERRENCE A. CORRIGAN, ESQ.

Attorneys for Petitioners

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STATEMENT

Petitioners submit this reply brief pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States to address certain arguments raised by respondents in their brief in opposition to the petition for a writ of certiorari.

ARGUMENT

Respondents have raised at least three new arguments in their brief in opposition to the petition for a writ of certiorari. These arguments fail to address adequately the true issues which this case raises or the underlying reasons why this Court should grant the writ. Moreover, respondents' brief employs those arguments in a manner calculated to mislead this Court.

First, respondents claim that the *en banc* court vacated the factual determination by the panel that respondents invidiously discriminated against petitioners on the basis of race and nationality. This claim is totally inaccurate.

Second, respondents contend that the only question presented is whether petitioners "may invoke the Fifth Amendment to challenge the Attorney General's [sic] exercise of his authority to parole unadmitted aliens *into* this country pending a determination of their admissibility." (R. Br. at (I)). This question mischaracterizes the first Question Presented in the Petition for a Writ of Certiorari as reflected in the record in this case.

Finally, respondents assert that this case should be disposed of by a remand for a determination whether low-level officials had a facially legitimate and bona fide reason for detaining petitioners. In the context of the overwhelming record of discrimination, this argument is disingenuous and the proffered remedy is wholly inadequate.

POINT I

THE *EN BANC* COURT ACCEPTED THE FACTUAL FINDINGS BY THE PANEL OF DISCRIMINATION

The *en banc* court did not, as respondents repeatedly claim (R. Br. at 12, 17-18), vacate the factual findings of the panel that respondents invidiously discriminated on the basis of race

and nationality. On the contrary, the *en banc* court expressly did *not* disturb the panel's findings of discrimination:

> Because the facts of this case have been extensively set forth in the opinions of *the panel* and the district court, we proceed directly to a discussion of legal questions involved.

Jean v. Nelson, 727 F.2d 957, 962 (11th Cir. 1984) (*en banc*) (emphasis supplied). (To the extent that there is any conflict between the panel and the district court, the findings of the panel, as the higher court, prevail.) The *en banc* court assumed the existence of such discrimination* but concluded that it did not violate the Constitution. Indeed, had the *en banc* court agreed with the district court as respondents claim, it would have been unnecessary for the *en banc* court to write an opinion. The *en banc* court could have simply affirmed on the basis of the district court's factual findings.**

Respondents also incorrectly assert that the panel's decision was limited to nationality discrimination. On the contrary, the panel did *not* limit its finding of "intentional government

*Neither in oral argument nor in its briefing request to counsel did the *en banc* court question the existence of discrimination. Indeed, the court's only direction to counsel was that "[c]ounsel are requested to specifically address the issue of whether the Haitian plaintiffs have rights under the U. S. Constitution in their *en banc* briefs." Letter of Clerk, Aug. 16, 1983. Further, the only aspect of the panel's discussion concerning discrimination which the *en banc* court expressly disapproved was the legal conclusion that such invidious race and nationality discrimination violated the Constitution.

**Of course, even if the *en banc* court had vacated the panel's finding of race and nationality discrimination, this Court could conduct its own independent review of the facts to determine whether the district court's factual finding of non-discrimination was clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). In light of the overwhelming evidence of essentially unrebutted discrimination contained in this record, this Court could only conclude, as did the panel, that "the district court's findings were clearly erroneous." *Jean v. Nelson*, 711 F.2d 1455, 1494 (11th Cir. 1984). In any event, whatever the findings were by the panel and district court, this Court has a duty to determine whether discrimination occurred, and on this record, can only conclude that it did.

discrimination" against petitioners, *Jean v. Nelson*, 711 F.2d 1455, 1497 (11th Cir. 1983), to nationality-based discrimination. The panel simply noted that "[t]he *bulk* of the evidence ... was addressed to the nationality claim." *Id.* at 1485 n.29 (emphasis supplied). In fact, petitioners submitted voluminous evidence of racial discrimination against class members. In any event, even if discrimination were based solely on nationality, it would be no less despicable and unconstitutional, particularly where, as here, the affected class is overwhelmingly black. *See Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 451 (S.D. Fla. 1980), *aff'd as modified sub. nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982).*

POINT II

THE "QUESTION PRESENTED" AS DEFINED BY RESPONDENTS IN THEIR BRIEF IS INACCURATE AND MISLEADING

Respondents' suggestion that the only question presented is whether petitioners "may invoke the Fifth Amendment to challenge the Attorney General's [sic] exercise of his authority to parole unadmitted aliens *into* this country pending a determination of their admissibility" reveals a basic misunderstanding of the critical distinction between the two entirely different meanings of parole in immigration law. It also is misleading because it implies that the actions of the Attorney General, individually, are at issue. In fact, what is at issue are the actions of low-level INS officials acting in disregard of the mandate of the Attorney General for an "evenhanded" rule of detention. *Jean v. Nelson*, 711 F.2d 1455, 1471 (11th Cir. 1983).

This case does not involve parole *into* the country in the sense of admission, but simply *temporary release from physical custody* pending a determination of asylum and final excludability. Such temporary release from physical custody does

*It is not correct to say, as respondents do (R. Br. at 18), that a vacated opinion is "entirely void of any precedential force." Indeed, by relying on a vacated opinion, respondents themselves acknowledge that such an opinion has some force. (See R. Br. at 23 n.18).

not affect an alien's immigration status. 8 U.S.C. § 1182(d)(5)(A); *Kaplan v. Tod*, 267 U.S. 228 (1925).* Thus, such temporary release is no more "related to" the determination of whether to admit or exclude an alien (R. Br. at 15)* than granting bail to a criminal defendant is related to a determination of guilt or innocence.

Even assuming, for the sake of argument, that parole in the sense of temporary release from physical custody is "related to" admission, there is nonetheless no legitimate relationship between invidious race and nationality discrimination in granting or denying parole and determining who may be admitted into this country or granted asylum. Neither respondents nor the *en banc* court ever explained how invidious discrimination in parole determinations by low-level INS officials has any rational relationship to

*The provisions of the immigration statute permitting the Attorney General to detain excludable aliens were never intended to require prolonged physical detention. Testimony of Charles Gordon, a former general counsel of INS and author of the leading treatise in the field of immigration law (Tr. 151); Sam Bernsen, a former general counsel of INS (Tr. 209); Donald I. Bierman, an immigration law expert (Tr. 1613); James Orlow, an authority on immigration law (Tr. 611).

*Respondents' argument that race and nationality discrimination in the denial of parole (temporary release) is wholly immune from constitutional scrutiny simply because it is "related to" admission (R. Br. at 15) repeats the fundamental inconsistency inherent in the *en banc* court's position. It approved constitutional scrutiny of other actions equally related to admission. *Wong Wing v. United States*, 163 U.S. 228 (1896); *United States v. Henry*, 604 F.2d 908 (5th Cir. 1979) (questioning by immigration officers of excludable alien attempting to enter country by falsely misrepresenting himself as U.S. citizen). When it held that the Haitian Refugee Center, Inc. had a first amendment right of access to petitioners in detention, *Jean v. Nelson*, 727 F.2d at 983, it necessarily recognized a reciprocal first amendment right of access belonging to petitioners since the first amendment protects both the conveyance and receipt of speech. This Court has repeatedly intervened to halt government interference with communications between a willing speaker and a willing listener. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Moreover, the *en banc* court was apparently influenced by the unsupported argument, and assumed erroneously, that temporary release on parole pending determination of excludability effectively provided the class with rights of an [redacted]admitted alien.

the standards for admission or the status of being admitted under law. *See* Petition for Writ of Certiorari at 22-23. The issue which this Court should decide is not whether the Attorney General has properly exercised his authority to exclude or to deny asylum. Not only was this issue not raised below, but it can only be determined in individual exclusion hearings. The issue which this Court should decide is whether invidious discrimination on the basis of race and nationality by low-level immigration officials, acting pursuant to neutral statutes and directives, in the incarceration of excludable black Haitian refugees in detention camps, is wholly beyond constitutional scrutiny.

POINT III

THE NARROW STANDARD OF REVIEW PROPOSED FOR REVIEW OF DISCRIMINATION ON REMAND DENIES MOST CLASS MEMBERS THE CONSTITUTIONAL CLASS-WIDE RELIEF TO WHICH THEY ARE ENTITLED AND PROVIDES A MEANINGLESS STANDARD FOR THOSE STILL IN DETENTION

A remand to the district court to determine under a novel, non-constitutional standard whether low-level officials had a "facially legitimate and bona fide reason" to detain petitioners fails to provide them complete relief. The remand is not directed to, and provides no relief for, the approximately 1700 class members who have already been released from illegal detention. In the absence of review by this Court, these petitioners would be denied the class-wide injunctive and declaratory relief which the panel provided, and to which they are entitled under the Constitution, to prevent the recurrence of the decade-long pattern of invidious discrimination by INS officials against Haitians.* *Swann v. Charlotte-Mecklenburg Bd. of Education*,

*Such invidious discrimination continues. The INS has confirmed that it plans to deny permanent residency to Haitians who qualify under the Cuban-Haitian entrant program, but to grant such status to non-Haitians. N.Y. Times, Oct. 21, 1984, § 1, at 23, col. 1.

402 U.S. 1 (1971); *Jean v. Nelson*, 711 F.2d 1455, 1509-10 (11th Cir. 1983).**

Furthermore, the narrow, non-constitutional standard of "facially legitimate and bona fide reason" for review of discrimination for those petitioners remaining in detention is not only incorrect, but illusory. This Court has long held that the proper standard is strict scrutiny. *Korematsu v. United States*, 323 U.S. 214 (1944). The standard proposed by the *en banc* court is hopelessly inadequate to protect against future discriminatory action and provides an all too easy way for an agency to mask discrimination. Such a standard would preclude the district court from examining almost any alleged "facially legitimate and bona fide" reason put forth by the agency to justify its action, even if wholly pretextual.

CONCLUSION

For all the foregoing reasons and the reasons set forth in the Petition for a Writ of Certiorari, this Court should grant a writ of certiorari.

Respectfully submitted,

†Ira J. Kurzban, Esq.
National Emergency Civil
Liberties Committee and
Haitian Refugee Center, Inc.
Kurzban, Kurzban & Weinger, P.A.
700 Brickell Avenue, Suite 901
Miami, Florida 33131
(305) 371-0268

†*Counsel of Record*

**Indeed, if the decision were left to respondents, petitioners would receive no class-wide relief. *See* Defendants' Memorandum in Response to Order on Mandate and Plaintiffs' Memorandum, Oct. 15, 1984, at 4.

Bruce J. Winick, Esq.
American Civil Liberties Union
Foundation of Florida, Inc.
University of Miami School of Law
P. O. Box 248087
Coral Gables, Florida 33124
(305) 284-2971

Irwin P. Stotzky, Esq.
University of Miami School of Law
P. O. Box 248087
Coral Gables, Florida
(305) 284-2971

Christopher Keith Hall, Esq.
National Emergency Civil
Liberties Committee and
Haitian Refugee Center, Inc.
32-32 32nd Street
Long Island City, New York 11106
(718) 204-5427

Michael Rosen, Esq.
American Civil Liberties Union
Foundation of Florida, Inc.
17 West Flagler Street
Miami, Florida 33131
(305) 377-3736

Of Counsel:
Fried, Frank, Harris, Shriver
& Jacobson
One New York Plaza
New York, New York 10004
(212) 820-8000

By: Robert E. Juceam, Esq.
Terrence A. Corrigan, Esq.

JOINT

APPENDIX

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CLERK

No. 84-5240

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL., PETITIONERS

v.

ALAN NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

IRA J. KURZBAN
Counsel of Record
KURZBAN, KURZBAN & WEINGER
Suite 901
700 Brickell Avenue
Miami, Florida 33131
(305) 371-0268

BRUCE J. WINICK
IRWIN P. STOTZKY
CHRISTOPHER KEITH HALL
MICHAEL J. ROSEN

Of Counsel:
ROBERT E. JUCEAM
TERRENCE A. CORRIGAN
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
New York, New York
Counsel for Petitioners

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Respondents

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 1, 1984
CERTIORARI GRANTED DECEMBER 3, 1984

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UNITED STATES DISTRICT COURT

81-1260-CIV EPS

MARIE LUCIE JEAN, ET AL.

v.

ALAN C. NELSON, ET AL.

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1981		
June 10	1	HABEAS Corpus Petition, Copy mailed to Atty. Gen. w/o affidavit f/p fw
10	2	EMERGENCY motion for a stay of exclusion and deportation and for a hearing thereon, by petitioners. fw
16	6	AMENDED PETITION for Writ of Habeas Corpus and Complaint for declaratory, injunctive and mandatory relief—class action by pltfs. fw
18	14	*RETURN* to amended petition for Habeas Corpus and motion to have parties dropped and claims severed in complt for declaration inj. & Mandatory relief by fed defts. fw
26	20	MOTION to maintain the amended petition for habeas corpus as class action by pltfs & petitioners. fw
29	23	MOTION to maintain the amended petition for habeas corpus as class action, by pltf. fw

DATE	NR.	PROCEEDINGS
1981		
July 7	26	FINDINGS of fact: (ALH) Respondents' motion to have ptys dropped and claims severed Denied. Respondents have 60 days to prepare and respond to new claims raised in amended petition. (EOD 7/8/81-CCAP) fw
9	27	ORDER (ALH) motion of respondents granted subpoenas served on William Nail and Joseph Monsanto hereby Quashed. (EOD 7/10/81-CCAP) fw
10	28	MOTION to vacate petitioners' final orders of exclusion and to remand to immigration & naturalization service, by respondents. NR #38 fw
17	30	MOTION for TRO, by pltf. fw
Aug. 6	35	MOTION for TRO, by pltf. fw
10	38	ORDER (ALH) defts' mot to vacate pltfs' final orders of exclusion and Remand to Immigration and Naturalization service for any lawful proceeding hereby Granted. (EOD 8/11/81-CCAP-M)
12	39	MOTION for preliminary injunction, by pltfs. fw
24	50	SUPPLEMENTAL pldg and 2nd AMENDED COMPLT for declaratory, inj. & Mandatory relief—class action, by petitioners. fw
Sept. 9	90	ORDER (ALH) Granting pltf's mot for leave to file supp pldg and 2nd amended complt. (EOD 9/15/81-CCAP) fw
22	103	EMERGENCY MOTION for stay of deportation and for a hearing thereon, by Pltfs. rw

DATE	NR.	PROCEEDINGS
1981		
Sept. 22	104	ORDER (SMA) granting stay to 9/24/81 of deportation. (EOD-9/28/81-CCAP). rw
28	108	MOTION to dissolve temporary Restraining order, by defts. rw
30	115	ORDER (ALH) granting temporary restraining order. (EOD-10/5/81-CCAP). rw
30	116	ORDER (ALH) granting pltfs' Motion for Class Certification. Class is certified and defined as noted herein. (EOD-10/5/81-CCAP). rw
Oct. 6	119	ORDER (ALH): TRO entered 9/30/81 has dissolved and is converted into and to be cont'd as a Preliminary injunction. Defts are enjoined from deporting all Haitian aliens who have arrived in the Southern District of Florida on or after 5/20/81 who applying for entry into the U.S. and presently held in detention facilities. See order for further details. (EOD-10/10/81-CCAP). rw
13	124	MOTION to dissolve or modify the prel. inj. and TRO and immediate hearing, by defts. fw
21	139	LETTER to Richard A. Marshall. AUSA re: "voluntarily return" to Haiti, from Ira J. Kurzban. fw
28	142	LETTER to Mr. Kurzban re: provide you w/notice should Haitians desire to return to Haiti, from R. Marshal, Jr. AUSA. fw
Nov. 2	153	EMERGENCY motion for stay and for continuance of TRO, w/memo, by pltfs. fw
4	154	MOTION & memo for emergency hrg. on defts' mot to dissove prel inj. and TRO for immediate hrg w/memo, by defts. fw

DATE	NR.	PROCEEDINGS
1981		
Nov. 5	155	ORDER (SMA) action defts outline in letter to Chief Judge 10/29/81 deportation and repatriation of four hundred (435) Haitian aliens who defts claim wish to w/draw appl. for admission to USA and return to Haiti prohibited by previous orders of Judge Hastings. (EOD 11/5/81-CCAP) fw
*2	167	LETTER to Judge Atkins re: repatriating Haitians who have withdrawn their applications for admission, from Richard A. Marshall, Jr. AUSA. fw
*2	168	LETTER to Judge Aronovitz re: Prepared to transport Haitians from USA and Puerto Rico wishing to return to Haiti from Richard A. Marshall, Jr. AUSA. fw
14	170	ORDER (JWK) Modifying prel inj. as to those Haitians having withdrawn applications for admission (List attached). (EOD 11/17/81-CCAP) fw
19	171	MOTION and memo of law to assign this case to a Judge for all purposes, by Govt. fw
23	176	ORDER (JWK) Modifying prel inj.: as to those individuals whose names and Immigration "A" file nos. are listed on attached schedule. (EOD 11/25/81-CCAP) fw
24	177	MOTION to modify prel inj. as to Haitians seeking vol. repatriation at Ft. Allen, PR., by defts. fw
25	178	NOTICE of filing corrected mot and memo to modify prel inj. as to Haitians seeking voluntary repatriation at Ft. Allen, by defts. fw

DATE	NR.	PROCEEDINGS
1981		
Nov. 25	181	ORDER (JWK) Deft's mot to modify prel inj Granted and defts may immediately repatriate upon entry of this order all Haitians located at Fort Allen, P.R. who have or will w/draw appl. for adm. into U.S. Finds this cause certified as class action. (EOD 12/1/81-CCAP) fw
Dec. 3	183	ORDER OF REASSIGNMENT to Calendar of Judge Eugene Spellman. (EOD 12/3/81-CCAP, by P. T., Clerk. fw
7	184	MOTION to reconsider order of 11/25/81, modifying repliminary injunction and to clarify and modify portions, and in the alternative for an injunction pending appeal; and memo in supp, by pltfs. cs
8	188	CERTIFICATION of the Clerk JIB to reassign cause on a districtwide basis. Clerk notifies en banc that cause by virtue of random selection is reassigned permanently to EPS, and all pleadings hereinafter filed in cause to bear the number 81-1260-CIV-EPS. cs
8	189	ORDER (CCA) granting government's mot to reassign and reassignment. (EOD-12/9/81-CCAP). cs
9	190	ORDER (JWK): Pltfs mot for reconsideration of court's order of 11/25/81 modifying preliminary injunction is denied. (EOD-12/11/81-CCAP). cs
31	214	*ANSWER*, by defts Doris Messner, Joe Howerton, Lee Rowland, Fred Alexander and INS and William French Smith. cs

DATE	NR.	PROCEEDINGS
1982		
Jan. 14	229	MOTION to consolidate hearing on mot for preliminary injunction with trial on the merits, by government. cs
29	257	ORDER (EPS) Consolidating hearing on mot for a preliminary injunction with trial on the merits on 3/1/82 at 9:30. (EOD-2/1/82-CCAP). cs
Feb. 9	288	ORDER (EPS) denying decertification and granting modification of class and preliminary injunction. (EOD-2/18/82-CCAP). cs
24	313	MEMO OPINION AND ORDER (EPS) Grantin deft. motion to dis in part. (See order for details) EOD-3/1/82-CCAP) br
Mar. 2	336	PRETRIAL stipulation, by both parties. cs
2	337	PROPOSED pretrial stipulation, by defts. cs
3	340	ORDER (EPS-3/2/82) substituting party deft. Alan Nelson be substituted as named deft in action and prior deft Doris Meissner be dropped as party to cause. (EOD-3/4/82-CCAP). cs
4	353	ORDER (EPS-3/4/82) enjoining the transfer of class members from their present locations. (EOD-3/9/82-CCAP). cs
9	362	ORDER (EPS-3/9/82): Affirmative defense numbers 2, 3, 7, and nine are moot in light of court's order of dismissal dated 2/24/82. Said affirmative defenses are hereby dismissed. (EOD-3/11/82-CCAP). cs
16	370	STIPULATION regarding intervention of Dade County Bar Association Haitian Refugee Volunteer lawyer Task Force, by INS. cs

DATE	NR.	PROCEEDINGS
1982		
Mar. 16	371	ORDER (EPS-3/16/82) approving stip regarding intervention of Dade County Bar Association Haitian Refugee Volunteer Layer Task Force. (EOD-3/18/82-CCAP). cs
18	372	MOTION for leave to transfer class members, by U.S.A. cs
29	385	ORDER (EPS-3/26/82) granting in part and deying in part defts mot for permission to transfer class members. (EOD-3/30/82-CCAP). cs
Apr. 7	392	ORDER (EPS-4/6/82) denying pltfs request for preliminary injunction and renewed mot for preliminary injunction will be consolidated with the trial on the merits, and ct will reserve ruling on the propriety of relief sought therein until trisl is concluded. (EOD-4/8/82-CCAP). cs
19	413	ORDER (EPS-4/19/82) vacating order, granting defts' mot for leave to transfer class members.
26	416	RESPONSE to court order requesting the establishment of a Nationwide Haitian Pro Bono representation program, by defts. cs
30	429	ORDER (EPS-4/29/82) clarifying court's order of 4/19/82. (EOD-5/5/82-CCAP). cs
June 18	452	MEMO opinion (EPS-6/18/82.) lw
23	453	PLAN for release by pltf. lw
29	465	MOTION & memo for stay pending appeal, by defts. lw
29	466	MOTION & memo to modigy final judgment & alt. for partial stay pending appeal, by defts. lw

DATE	NR.	PROCEEDINGS
1982		
June 30	467	*NOTICE OF CROSS-APPEAL* filed by pltfs. from the order granting deft. mot to dismiss in part entered 2/24/82 & from the order entered 6/18/82 styled memo opinion & from the order rntered 6/29/82 styled final judgment & from the order entered 6/29/82 denying pltfs. mot for reconsideration. (cc USCA & all counsel of record) rd
29	468	NOTICE of intention to proceed with rule making & renewed request for stay. rd
29	469	FINAL JUDGMENT (EPS 6/29/82) referring to Ct's 6/18/82 opinion & subsequent hearing on 6/23/82 to det effect of Ct's ruling. New detention policy is null & void & policy re parole, that was used prior to 5/20/81 is in full force & effect. St believes that remedy that best serves int of all parties to litigarion is an interim palan for release of pltfs on parole subj to conditions set forth pending a determination of their claims for admission. ORDERED: 1. Final judgment entered in favor of defts as to Count VII of Compit. 2. Final judgment entered in favor of pltfs as to Count II of Compit. 3. Defts are enjoined from enforcing their policy of detaining excludable aliens unless they est to INS' sat a claim for admission. Inj shall not be construed to preclude detention of excludable aliens deemed a security rist or likely to abscond. 4. Defts. are enjoined from cont to detain pltfs herein & are ordered to release said individuals. 5. Implementation of #4 is to be commenced forthwith in accordance w/

DATE	NR.	PROCEEDINGS
1982		
June 29	469	terms & conditions set forth in this judgment. (see court file for detailed info) 6. Granting mot of Haitian Refugee Center, Inc. to enlarge class to include all Haitians in detention for whom a G-28 has been filed on behalf of said pltfs. Said indiv are included w/in said class & are bound by full effects of Ct's opinion of 6/18/82 & provisions of final judgment. 7. Ct vacates any interlocutory orders entered by Ct or by predecessor Judge & does relinquish jurisdiction over the members of said class to ext that same is not hereafter retained by Ct. 8. Ct retains jurisdiction over parties & subj matter on a) defts' mot to vac Ct' order enjoining exclusionary hearings relative to members of class who are not rep by either private or pro bono counsel b) Ct's order of 2/8/82 as the same pertains to the pro bono program of the Dade County Bar Assn c) Pltf's mot ordering granting of relief to indiv members of class who have escaped from detention to be entitled to benefits of Ct's opinion of 6/18/82 & Ct's final judgment d) enforcement of the terms & conditions of this final judgment e) pltf's mot for award of attys' fees & all costs w/understanding that

DATE	NR.	PROCEEDINGS
1982		
June 29	469	retention of jurisdiction as to that issue is not a det of merits of entitlement of pltfs to either attys' fees or costs. lw
		(EOD 7/2/82-CCAP-M) (The class certified by the Court is indicated on page 2 of the docket sheet) lw
29	470	ORDER (EPS-6/29/82) denying pltfs' mot for reconsideration of Ct's order of dism. Granting pltfs' mot to amend the class; class is modified to include all indiv who would be w/in the class as defined by for the fact that they are rep by counsel. Pltfs are directed to provide notice of modification to those indiv not previously members of this class. Said indiv have 20 days to notify Ct of their intention to opt out of this action or they will be deemed members of class herein & subj to all requirements. Class mod expressly exempts from its purview those indiv subj of Judge Robert L. Carter's Order & the 2nd Circuit's recent opinion which Ct understands to be 53 indiv. This order is part of Ct's final judgment, which is now final as to all counts. Class as modified shall be entitled to all of relief afforded by final judgment. (EOD 7/2/82-CCAP-M) lw
30	471	ORDER (EPS-6/30)82) denying defts' mot for a stay of Ct's entire final judgment. Defts' mot for a partial stay, w/regard to prospective effects of final judgment, will be taken under advisement for a period of 10 days. (EOD 7/2/82-CCAP) lw

DATE	NR.	PROCEEDINGS
1982		
June 30	472	ORDER (EPS-6/30/82) denying defts' mot for modification of the class. Denying defts' mot to amend final judgment to permit prospective application of detention policy for 10 days. Ordered nunc pro tunc to 11:00 A.M., 6/30/82. (EOD 7/2/82-CCAP) lw
30	473	*NOTICE of appeal* filed by defts. from the final judgment entered 6/29/82. (cc USCA & all attys. of record) this appeal was filed in open court. . .
July 2	475	ORDER (EPS) GRANTING dmot. for partial stay; on 6/30/82, the Court indicated that under no circumstances would it stay the release of the pltfs now in detention but, upon a proper showing of an intent to engage in rulemaking & a liklihood of irreprabale harm during the interim a stay would be considered w/regard to aliens who arrive in the future. On 7/1/82 defts filed a not. of intent tp proceed w/rulemaking, on 7/2/82 St. of Fl filed their renewed mot to intervene w/mot for part. stay, consistant w/information obtained your affiant fears a renew in flux of Hatian & other aliens if the cts judgment (6/29/82) is not stayed. ORDERED that the portion of cts final judgment 6/29/82 is stayed for a period of 30 days, defts shall publish not of their intent to engage in rulemaking w/regard to detention no later than 30 days after this order, failure to do so will result in lifting of this stay. EOD-7/7/82 7/2/82-EPS.
19	—	RECORD on appeal trans. to USCA, consisting of 17-vol. plead, 45-vol. trans., 3-acc. fold. depos., exhibits retained in Judges office. rd

DATE	NR.	PROCEEDINGS
1982		
July 21	—	FIRST SUPP. record on appeal trans. to USCA, consisting of 5-boxes (4-boxes of exhibits & 1-box depsos) The balance of the exhibits are in EPS-office. rd
16	492	NOTICE of Publication of Rule Making on 7/9/82, at Vo. 47, No. 132 of the Federal Register. (GOVT) ai
20	493	ORDER of USCA-Denying Govt's Motion for Partial Stay of Judgment ent. 6/29/82. (7/13/82-CA) (82-5772) (EOD-7/22/82-M) ai
22	—	SECOND SUPPLEMENTAL Record on Appeal transmitted to USCA—2 vols transcript. ai
1983		
Mar. 15	564	PARTIAL ORDER: (EPS/3/9/83) Gov't's mot to modify the injunction which prohibits the holding of exclusion proceedings for class members not represented by counsel shall be postponed for at least 75 days pursuant to the Gov't's request made in open court. Pltf's mot to have the Court compel gov't to expend funds to effectuate this Court's Final Order is moot. Pltf's mot that the Court hold the Gov't in civil contempt for violating the Court's order of 2/17/83 denied. EOD/3/16/83-CCAP) rmw
22	566	ORDER: (EPS/3/21/83) Court adopts Robie plan for class members represented by pro bono counsel with modifications & additions. (See court file) (EOD/3/25/83-CCAP) rmw
22	567	ORDER: (EPS/3/21/83) Exclusion hearing procedure for class members represented by pro bono counsel. (See file for details) (EOD/3/25/83-CCAP) rmw

DATE	NR.	PROCEEDINGS
1983		
Apr. 15	570	MEMORANDUM opinion & ORDER: (EPS/4/14/83) denying pltfs' mot to have the Court extend the benefits of the Court's Final Judgment to those class members who escaped detention prior to the entry of the Court's Final Judgment. (EOD/4/18/83-CCAP) rmw
Aug. 16	598	MEMO opinion & ORDER (EPS 9/15/83): denying pltfs motions to enjoin exclusion proceedings for & deportation of class members & granting pltfs' motion for 72 hours notice prior to effecting physical deportation. (EOD 9/19/83-CCAP). ltj
1984		
May 8	611	ORDER by USCA denying motion of appellees for stay. (USCA 5/4/84) (82-5772) (EOD-5/16/84-M-CCAP). cb
8	612	ORDER by USCA denying petition for rehearing. (USCA 5/4/84) (82-5772) (EOD-5/16/84-M-CCAP) cb
8	613	MANDATE OF USCA-order of District Ct in this cause DISMISSED IN PART, REVERSED IN PART and REMANDED WITH INSTRUCTIONS + each pty bear their own costs. USCA 5/4/84) (82-5772) (EOD-5/16/84-M-CCAP)

EMERGENCY HABEAS CORPUS PETITION TO STAY FINAL ORDERS OF EXCLUSION AND DEPORTATION AGAINST CERTAIN HAITIAN REFUGEES ISSUED BY THE IMMIGRATION AND NATURALIZATION SERVICE

FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER 28 U.S.C. § 2255

Marie Lucie Jean and Herold Jacques, on behalf of themselves and other Haitian aliens similarly situated, and the Haitian Refugee Center, Inc.

Alien numbers A26 004 585, A26 004 384

Immigration and Naturalization Service Detention Facility, Krome Avenue North, Miami, and/or the Federal Correctional Institute, and/or any other I.N.S. detention facility

United States District Court for the
Southern District of Florida

Case No. ————
(To be supplied by Clerk of U.S. District Court)

Marie Lucie Jean and Herold Jacques, on behalf of themselves and others similarly situated, and the Haitian Refugee Center, Inc.

v.

Doris Meissner, Acting Commissioner, Immigration and Naturalization Service; Joe D. Howerton, District Director, Immigration and Naturalization Service (District #6); Mr. Lee Rowland, Assistant District Director for Deportations, I.N.S. District #6; and Fred Alexander, I.N.S. Officer in Charge, Krome Avenue North Detention Facility, Additional Respondent.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future*

under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY
A PERSON IN STATE CUSTODY

INSTRUCTIONS—READ CAREFULLY

(Deleted)

PETITION

1. Name and location of agency which entered the judgment of exclusion and deportation under attack Immigration and Naturalization Service, District No. 6; 155 South Miami Avenue, Miami, Florida
2. Date of judgment of exclusion & dep. June 1-5, 1981 inclusive
3. Length of sentence exclusion and deportation. Sentencing judge Judge William F. Nail, and/or Judge Harry Scroope, and/or Judge Joseph Monsanto, and/or Judge Foster
4. Nature of offense or offenses for which you were convicted: found to the excludable alien
5. What was your plea? (Check one) n.a.
   (a) Not guilty ( )
   (b) Guilty ( )
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: ————————
6. Kind of trial: (Check one) n.a.
   (a) Jury ( )
   (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No ( ) n.a.

8. Did you appeal from the judgment of conviction?
   Yes ( ) No ( ) n.a.

9. If you did appeal, answer the following: n.a.
   (a) Name of court _____
   (b) Result _____
   (c) Date of result _____
   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes (X) No ( )

11. If your answer to 10 was "yes", give the following information:
    (a) (1) Name of court Immigration Court
    (2) Nature of proceeding Motion to Reopen and to Stay Deportation
    (3) Grounds raised Named petitioners and the aliens they represent were denied their right to a fair hearing and fair procedures in that, *inter alia*, they were denied access to attorneys providing free legal information and assistance, were denied an opportunity to be effectively informed of and to assert their rights to a public hearing, to be represented by counsel or a next friend, and to apply for political asylum in the United States, and therefore did not have an opportunity to assert their above-enumerated rights

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No (x)
(5) Result None as yet
(6) Date of result none as yet

(b) As to any second petition, application or motion give the same information:
(1) Name of agency Immigration and Naturalization Service
(2) Nature of proceeding Application for Stay of Deportation
(3) Grounds raised same as 11(a)(3) above
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No (x)
(5) Result none as yet
(6) Date of result none as yet

(c) As to any third petition, application or motion, give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )
(5) Result _____
(6) Date of result

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion: n.a.

(1) First petition, etc. Yes ( ) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: habeas is the method of challenging a final order of exclusion.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed

below. The petition will be returned to you if you merely check (a) through (j) or any of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Petitioners were denied their right to a fair exclusion hearing and to fair proceedings, and to consult with counsel.

Supporting FACTS (tell your story *briefly* without citing cases or law): Named petitioners and

some 83 other Haitian aliens similarly situated were subjected to exclusionary proceedings and/or so-called "advisory meetings" without counsel during the week of June 1-5, 1981. They appeared without counsel and were physically denied access to attorneys from the Haitian Refugee Center, Inc. seeking to provide free legal information and assistance. They didn't understand that the purpose of the "hearing" was to exclude and deport them, or that they had the right to consult with counsel. They didn't understand that they had the right to a formal and public hearing. They didn't understand that they had the right to claim political asylum. As a result, any so-called waivers of these rights they are alleged to have made were not knowingly and intelligently made.

B. Ground two: Petitioners were denied their right to claim political asylum.

Supporting FACTS (tell your story *briefly* without citing cases or law): Named petitioners and many of the others they seek to represent would like to make political asylum claims. They did not understand that they had a right to do so, and any so-called waiver of their right to do so was not knowingly and intelligently made.

C. Ground three: The Haitian Refugee Center, Inc. and its attorneys and other employees were denied their First Amendment right of access to potential members and clients.

Supporting FACTS (tell your story *briefly* without citing cases or law): The Haitian Refugee Center, Inc. is a not-for-profit membership corporation located in Miami, Florida. From its inception, the membership of H.R.C., Inc. has come from Haitian refugees seeking asylum in the United States. All Haitian aliens in Florida are

automatically members of H.R.C., Inc. H.R.C., Inc.'s major purpose is to assist these refugees in their efforts to obtain asylum. Toward this end H.R.C., Inc. provides social, economic, legal, and organizational assistance for its refugee members. Thus all petitioners are members, and H.R.C., Inc. would be harmed, financially and otherwise, by their deportation. The Haitian Refugee Center, Inc. has a close and substantial relationship with the Haitian refugees in Florida, and there are substantial obstacles—financial, language literacy, and a general aversion to making claims against the Government reinforced by years of political persecution by the Government of Haiti—that make it exceedingly difficult if not impossible for many if not all Petitioners to assert their own rights. During the period June 1-5, 1981, the Immigration and Naturalization Service deliberately and intentionally prevented attorneys and other H.R.C., Inc. employes from having access to petitioners, including the routing of petitioners up back stairwells and through the Clerk of Court's offices (where the Immigration Judges' chambers are located) and into the courtrooms through the back doors of those courtrooms, and including the "shouting down" of H.R.C., Inc. employee Steve Forester by I.N.S. security officers, by Assistant District Director Metcalf, and by Judge Monsanto when Mr. Forester in a public hallway was trying to inform a group of petitioners of their rights and the "shouting down" of Mr. Forester and other H.R.C., Inc. employees by I.N.S. officials on other occasions, and including the "double timing" of petitioners, i.e. making them run, down the approximately twenty feet between the door of the Clerk's office and the top of the stairwell on the 6th Floor of the I.N.S. building at 155 South Miami Avenue, and down the stairwell itself, at

the approach of Mr. Forester and/or other H.R.C., Inc. employees, on at least three occasions, when they desired to inform the aliens of their rights.

D. Ground four: Petitioners were discriminated against based on race and national origin in violation of equal protection.

Supporting facts: No other refugee group has been subjected to summary and secret exclusion procedures and physically prevented from having access to counsel. On information and belief, such discriminatory treatment is based on race and national origin.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes (x) No ( ) I.N.S.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein: none

(a) At preliminary hearing ———————

(b) At arraignment and plea ———————

(c) At trial ———————

(d) At sentencing ———————

(e) On appeal ———————

(f) In any post-conviction proceeding ———————

(g) On appeal from any adverse ruling in a post-conviction proceeding: ———————

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ( ) No ( ) n.a.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No ( ) n.a.

(a) If so, give name and location of court which imposed sentence to be served in the future: ———————

(b) And give date and length of sentence to be served in future: ———————

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ( ) No ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Miami, Dade County, Florida
City, County, State

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 10, 1981

Attorneys for Petitioners

By /s/ Vera A. Weisz
VERA A. WEISZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 81-1260-CIV-ALH

MARIE LUCIE JEAN, HEROLD JACQUES, and LUCIEN LOUIS, on behalf of themselves and all others similarly situated; WILNER LUBERISSE and JOB DESSIN, on behalf of themselves and all others similarly situated; and THE HAITIAN REFUGEE CENTER, INC., a non-profit membership corporation, on behalf of itself and its members, PETITIONERS AND PLAINTIFFS

vs.

DORIS MEISSNER, Acting Commissioner, Immigration & Naturalization Service; JOE G. HOWERTON, District Director, Immigration & Naturalization Service, District VI; LEE ROWLAND, Assistant District Director For Deportation Immigration & Naturalization Servvice, District VI; FRED ALEXANDER, Officer In Charge, Krome Avenue North Detention Facility; THE IMMIGRANTION & NATURALIZATION SERVICE; WILLIAM FRENCH SMITH, Attorney General Of The United States, RESPONDENTS AND DEFENDANTS

AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDATORY RELIEF—CLASS ACTION

I. PRELIMINARY STATEMENT

1. This is a combined Petition for a Writ of Habeas Corpus on behalf of a class of Haitian refugees ("Petitioners") who between June 1 and June 5, 1981, received final orders of exclusion and deportation and are sought to be excluded and deported by Respondents, [herein-

after referred to as Defendants) and a Class Action by the HAITIAN REFUGEE CENTER, INC., on behalf of itself and its members, and by a class of Haitian refugees ("Plaintiffs") arriving in the United States on or after May 20, 1981, who have applied for entry into the United States, are being detained without parole, and who are or shortly will be engaged in various stages of exclusion proceedings by Defendants but against whom a final non-appealable order of exclusion and deportation has not as yet been entered. This action challenges a variety of procedures and policies used in the processing of these Haitian refugees for exclusion—procedures and policies that have already been applied to the habeas Petitioners, some of which procedures and policies have already been applied to the class action Plaintiffs, and some of which are threatened to be applied to the class action Plaintiffs. Petitioners and Plaintiffs thus assert a right to relief jointly and severally in respect to and arising out of the same transaction, occurance, and series of transactions or occurrances involving common questions of law and fact, therefore making permissive joinder of these parties and their claims appropriate under Fed. R. Civ. P. 20(a).

Seven causes of action are asserted: (1) that the Defendant officials of INS District VI and their employees conducted preliminary interviews with Petitioners and Plaintiffs in which the refugees were compelled to appear in person before INS representatives without being permitted to be accompanied, represented, and advised by counsel, and without being advised of their right to do so, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 555(b); (2) that on or about May 20, 1981, Defendants changed their prior policy with respect to the parole and detention of Haitian refugees arriving after that date, the order in which such refugees would be subjected to exclusion proceedings, and the manner in which such proceedings would be conducted, a change in policy which is unlawful since not

accomplished in accordance with the rulemaking requirements of the APA, 5 U.S.C. § 553; (3) that Defendants failed to provide Petitioners with adequate notice of their right to counsel at exclusion hearings and of their right to a hearing on which they would have a reasonable opportunity to present evidence, to examine and object to evidence, and to cross-examine witnesses against them, failed to give Petitioners written notice of the purpose of their detention and hearing, and on information and belief, threaten not to provide such notice to Plaintiffs when and as they are subjected to exclusion proceedings, all in violation of INS Operation Instructions, Regulations, 8 C.F.R. §§ 235.6(a), 236.2(b) and 236.3 (a) (1981), Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, the Due Process Clause of the Fifth Amendment, and the United Nations Convention and Protocol Relating to the Status of Refugees ("Protocol"); (4) that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, access to counsel in connection with their exclusion proceedings, in violation of INS Operations Instructions, Regulations, 8 C.F.R. § 236.2(b) (1981), Section 292 of the Immigration and Nationality Act, 8 U.S.C. § 1362, the Due Process Clause of the Fifth Amendment, the First Amendment, and the Protocol, and in violation of Plaintiff HAITIAN REFUGEE CENTER, INC.'s rights under the First Amendment; (5) that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, their right to a public exclusion hearing, in violation of INS Operations Instructions and Regulations, 8 C.F.R. § 236.2(a) (1981), the Due Process Clause of the Fifth Amendment and the Protocol, or in the alternative, that Defendants denied Petitioners and on information and belief threaten to deny Plaintiffs, their right to a private hearing under said regulation; (6) that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, their right to apply for political asylum in violation of INS Operations In-

structions, Regulations, 8 C.F.R. § 236.3(a) (1981), Section 208 of the Immigration Act, 8 U.S.C. § 1158, and the Protocol, and denied Petitioners and on information and belief threaten to deny Plaintiffs their right to notice of their right to seek political asylum in violation of the Protocol, the Due Process Clause of the Fifth Amendment, 8 C.F.R. § 208.1 *et. seq.*, 8 C.F.R. § 236.3, Section 208 of the Immigration Act, 8 U.S.C. § 1158, INS Operations Instructions, and (7) that Defendants have applied a double standard regarding the exclusion of aliens, subjecting Haitian refugees but no other refugee group to the above policies and procedures, resulting in discrimination and threatened discrimination based on race and national origin in violation of the Equal Protection requirements of the Due Process Clause of the Fifth Amendment and the Protocol.

II. JURISDICTION

2. Jurisdiction is conferred on this Court with respect to the Petition for Habeas Corpus by 28 U.S.C. § 2241. Jurisdiction is conferred with respect to the Complaint for Declaratory, Injunctive and Mandatory Relief by 28 U.S.C. § 1331 which grants original jurisdiction to the District Court for matters arising under the Constitution, laws and treaties of the United States. As this action is brought against "the United States, an agency thereof or any officer, clerk or employee thereof in his official capacity," no necessary minimum amount in controversy is required. Pursuant to § 1331, this action principally arises under the APA 5 U.S.C. § 551 *et. seq.*; under the Due Process Clause and Equal Protection guarantees of the Fifth Amendment to the United States Constitution; under the First Amendment to the United States Constitution; under the Immigration and Naturalization Act, 8 U.S.C. § 1101 *et. seq.* and the Regulations and Operations Instructions adopted pursuant thereto; and under the United Nations Convention and Protocol

Relating to the Status of Refugees, 19 U.S.T. 6223 T.I.A.S. 6557. Jurisdiction is also conferred by 28 U.S.C. § 1361, which allows for mandamus actions to compel officers and employees of the United States to perform a duty owed to plaintiffs; 28 U.S.C. § 2201-2202 and Rules 57 and 65 of the Federal Rules of Civil Procedure, permitting declaratory and injunctive actions; and by 8 U.S.C. § 1329, concerning the power and scope of review by Federal Courts of matters involving the Immigration and Naturalization Act.

III. VENUE

3. Pursuant to 28 U.S.C. § 1391(e) venue lies in the Southern District of Florida because it is herein that Plaintiffs and Petitioners reside, where Defendants' policies and regulations were implemented and are applied and where the cause of action therefore arose, and where Defendants JOE D. HOWERTON, LEE ROWLAND, and FRED ALEXANDER reside.

IV. PARTIES

HAITIAN REFUGEE CENTER, INC.

4. Plaintiffs HAITIAN REFUGEE CENTER, INC. (hereinafter referred to as "HRC, INC."), is a non-profit membership corporation located in Miami, Florida. From its inception, the membership of HRC, INC. has come from Haitian refugees seeking political asylum in the United States. Under its charter, all Haitian aliens in Florida are automatically members of HRC, INC. The organization's major purpose is to assist these refugees in their efforts to obtain asylum. Toward this end, HRC, INC. provides social, economic, legal, and organizational assistance for its refugee members. As all named petitioners and plaintiffs, and the classes they represent are thus members of HRC, INC., the organization would be harmed, financially and otherwise, by their deportation. Such deportation would deprive HRC, INC.

of financial contributions from these refugees, and would frustrate its organizational purposes. HRC, INC. has a close and substantial relationship with Petitioners and Plaintiffs and the classes they seek to represent, and there are substantial obstacles—financial, language, literacy, and a general aversion to making claims against the government reenforced by years of political persecution by the Government of Haiti—that make it exceeding difficult if not impossible for many such refugees to assert their own rights.

PETITIONERS

5. Petitioners MARIE LUCIE JEAN, HEROLD JACQUES, and LUCIEN LOUIS arrived in Florida on or after May 20, 1981, and applied for entry into the United States. They were detained without parole and without bond at the INS Detention Facility at Krome Avenue. They were subjected to preliminary interviews by INS District VI employees in which they were compelled to appear in person before INS representatives, without being permitted to be accompanied, represented, or advised by counsel, or without being advised of their right to do so. They were also subjected to exclusionary proceedings and/or "advisory meetings" without counsel during the week of June 1-5, 1981. They would like to make political asylum claims, but have not as yet made them because they were not advised of their right to apply for political asylum and did not understand that they had the right to do so. As a result, Defendants issued final orders of exclusion and deportation for them. They bring this action individually and on behalf of a class of Haitian refugees similarly situated who have been subjected to identical procedures and for whom final orders of exclusion and deportation have been issued.

PLAINTIFFS

6. Plaintiffs WILNER LUBERISSE and JOB DESSIN are Haitian refugees who arrived in the United States on or after May 20, 1981, and applied for entry

into the United States. They were held for deferred inspection and are currently detained in INS Detention Facilities without parole or bond. They have been subject to preliminary interviews by INS employees without being accompanied, represented, or advised by counsel, and without being advised of their right to do so. They are in various stages of exclusion proceedings, but none have as yet been issued a final order of exclusion and deportation. They would like to apply for political asylum.

DEFENDANTS

7. Defendant DORIS MEISSNER is Acting Commissioner of the INS and in that capacity is chief executive officer of the INS. She is, therefore, directly responsible for the direction, conduct and action of the officers and employees of the INS concerning the acts challenged herein. She is sued in her official capacity.

8. Defendant JOE HOWERTON is District Director of INS District VI. He is responsible for conducting preliminary interviews of the Haitian refugees involved in this action, and is otherwise responsible for the acts challenged herein. He is sued in his official capacity.

9. Defendant LEE ROWLAND is Assistant District Director for Deportation, INS District VI. He is responsible for the threatened deportation of Petitioners and Plaintiffs. He is sued in his official capacity.

10. Defendant FRED ALEXANDER is the INS Officer in Charge of the INS Detention Facility at Krome Avenue North. In that capacity, he is directly responsible for a number of the acts challenged herein. He is sued in his official capacity.

11. Defendant WILLIAM FRENCH SMITH is Attorney General of the United States and in that capacity has final authority over the decisions, practices and procedures challenged herein. The Attorney General has delegated his authority under the Immigration and Naturalization Act to officials of the INS. He is sued in his official capacity.

12. Defendant, IMMIGRATION AND NATURALIZATION SERVICE is the agency involved in the acts challenged herein.

V. FACTUAL BACKGROUND

13. Numerous accounts of terror, brutality and torture have emanated from Haiti since "Papa Doc" Duvalier seized power in the 1950's and appointed his son Jean-Claude Duvalier, President-for-life in 1971. Haiti has been found to be "the most oppressive regime in the Western Hemisphere" with a government of "men not of law." *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442, at 475, 500-503 (S.D. Fla. 1980). For the past almost twenty-five years, tens of thousands of Haitians have fled the government of the Duvaliers in Haiti. Since 1972 at least forty thousand Haitians have come to the United States seeking refuge from the brutal and terrorist practices of the Duvalier government. The Haitian refugees have often come at great risk to their lives in unseaworthy boats over great distances. Many have lost their lives at sea in an attempt to seek asylum in this country. Unlike other refugee groups who have sought asylum in the United States, however, Haitians have received hostile treatment at the hands of immigration officials. This action involves the procedures and policies applied by the Immigration and Naturalization Service in its new program aimed at the rapid exclusion of newly arriving Haitian refugees.

VI. COUNT I [VIOLATION OF APA § 555(b)]

14. Named Petitioners and named Plaintiffs and the classes they seek to represent have been subjected to preliminary interviews in which they have been compelled to appear in person before representatives of the INS. At such preliminary interviews, statements are taken of such refugees by employees of the INS District VI office for use in subsequent proceedings, including exclusion hearings. Prior to or during such interviews, Petitioners

and Plaintiffs were not advised of their right to counsel, nor permitted to be accompanied, represented, and advised by counsel, in violation of the requirements of APA § 555(b). Had they known of their right to counsel at such preliminary interviews, Petitioners and Plaintiffs would have sought to be accompanied, represented and advised by counsel at such interviews.

VII. COUNT II [VIOLATION OF APA § 553]

15. Petitioners and Plaintiffs and members of the respective classes they represent refer to, realleage, and incorporate by reference as though set forth fully and at length herein paragraphs 1 through 14, *supra.*

16. Prior to May 20, 1981, Haitian "boat" people arriving by boat in South Florida were freely paroled once family members or sponsors were located. These refugees were processed for exclusion pursuant to a policy announced on January 20, 1981, by INS, under which refugees would be processed for exclusion in the order in which they arrived in the United States.

17. On or about May 20, 1981, Defendants adopted a new policy with respect to newly arriving Haitian "boat" people. Under this policy, Haitians arriving after that date were to be held in detention without parole or to be granted parole under standards substantially more restrictive than those that had prevailed prior to that date.

18. On information and belief, after May 20, 1981, under this new policy, Haitian refugees were to be subjected to "mass advisory meetings," the purpose of which is to induce said refugees to waive their right to counsel, to exclusion hearings and to political asylum.

19. Under this new policy, rather than processing refugees for exclusion in order of their arrival in this country, as had been the case previously, recent arrivals are to be subjected to exclusion proceedings on an expedited basis, prior to those refugees who have been paroled.

20. This new policy was adopted by Defendants without publication in the Federal Register of a general

notice of rulemaking, and otherwise without complying with the requirements of 5 U.S.C. § 553. The new policy constitutes a clear reversal of former policy with respect to the detention and processing of Haitian refugees. As it was accomplished on a class basis in across-the-board fashion, this new policy constitutes a rule within the cognisance of the APA, and is therefore invalid due to Defendants' failure to comply with the rulemaking or requirements of § 553. These new policies have already been applied to Petitioners. Some of them have already been applied to Plaintiffs, and on information and belief, Defendants will attempt to apply these new policies to Plaintiffs in the same fashion as they have already been applied to Petitioners.

VIII. COUNT III [DENIAL OF ADEQUATE NOTICE OF PROCEDURAL RIGHTS]

21. Petitioners and Plaintiffs and members of the respective classes they represent refer to, reallege, and incorporate by reference as though set forth fully and at length herein paragraphs 1 through 20 *supra.*

22. Named Petitioners and the class they seek to represent were subjected to exclusion proceedings and/or "advisory meetings" without counsel during the week of June 1-5, 1981. They were not informed and did not understand that the purpose of the "hearing" was to exclude and deport them, or that they had the right to consult with counsel. They did not understand and they were not advised that they would be afforded a reasonable opportunity to present evidence, to examine and object to evidence against them, and to cross-examine witnesses against them. They were not given written or oral notice of the purpose of their detention and hearing.

23. In the alternative, if petitioners were advised of any or all of these rights, they failed to understand the

meaning and significance of these rights, and they did not knowingly and voluntarily waive them or any of them. Had Petitioners understood their rights, they would have asserted them.

24. By failing adequately to provide notice of these rights, Defendants violated INS Operations Instructions, Regulations, 8 C.F.R. § 236.2(b) and 235.6(a) (1981), Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, the Due Process Clause of the Fifth Amendment, and the Protocol.

IX. COUNT IV [DENIAL OF ACCESS TO COUNSEL]

25. Petitioners and Plaintiffs and members of their respective classes refer to, reallege and incorporate by reference as though set forth fully and at length herein paragraphs 1 through 24, *supra.*

26. During the week of June 1-5, 1981, named Petitioners and the class they seek to represent were subjected to "advisory meetings" at which Defendants prevented attorneys and other employees of HRC, INC. from having access to Petitioners. This included the routing of petitioners up back stair wells and through the Clerk of the Immigration Court's offices (where the immigration Judges' chambers are located) and into the court rooms through the back doors of those courtrooms. This also included the "shouting down" of HRC, INC. attorney Steven Forester by INS security officers, by Assistant District Director Metcalf, and by Immigration Judge Monsanto when Mr. Forester in a public hallway attempted to inform a group of Petitioners of their rights to counsel and to seek political asylum. On other occasions when Mr. Forester and other HRC, INC. employees attempted to communicate with Petitioners, they were "shouted down" by INS officials. When Mr. Forester and other HRC, INC. employees attempted to inform Petitioners of their rights, INS employees caused Petitioners to run at "double time" the approximately twenty

feet between the door of the Clerk's office and the top of the stair-way on the sixth floor of the INS Building at 155 South Miami Avenue and down the stair-way itself in an effort to avoid the approach of Mr. Forester and other HRC, INC. employees.

27. During this week, Mr. Forester's repeated efforts to enter various rooms at the Immigration Building in which Petitioners were being held or in which "hearings" were being conducted, as well as the attempts of Mr. Forester and other employees of HRC, INC. to speak to Petitioners in such rooms, in hallways or in bathrooms in the immigration building, were frustrated by INS employees' exclusion of them from the room, sometimes by physical force.

28. On June 10, 1981, employees of HRC, INC. attempted to distribute leaflets—concerning the right of refugees to the assistance of counsel and to claim political asylum—to relatives of refugees held in the INS Detention Center at Krome Avenue who were waiting outside this Facility to visit the refugees in detention therein. HRC, INC. employees were prevented from distributing these pamphlets by INS employees. On this date, the attempt of one HRC, INC. employee to talk to relatives of the refugees inside the INS facility at Krome Avenue was ordered stopped by an INS employee.

29. On information and belief, Defendants' intend to pursue similar practices designed to deny employees of HRC, INC. access to Plaintiffs and members of the class they seek to represent, and to deny Plaintiffs and members of the class they seek to represent access to counsel from HRC, INC., as well as other attorneys.

30. On information and belief, Defendants will shortly move the location of exclusion and asylum hearings from the Immigration Building on South Miami Avenue to the INS Detention Facility at Krome Avenue, North, a distance of some thirty miles from downtown Miami, where most attorneys practicing immigration law at Miami have their offices. As it takes approximately one hour to

travel by automobile from Downtown Miami to the INS Facility at Krome Avenue, North, the proposed relocation of the hearings will almost completely curtail access of attorneys to Haitian refugees being held in detention for purposes of consultation and representation at hearings. Few if any members of the private Immigration Bar will be able or willing to make this lengthy trip, or will be able or willing to do so in more than a small number of cases. The additional travel time necessitated by this plan of relocation will reduce substantially if nor completely, the ability of HRC, INC. attorneys to represent refugees at the Detention Facility.

31. These policies of Defendants have violated and threaten to violate the rights of Plaintiffs and Petitioners to the assistance of counsel in exclusion proceedings, in violation of INS Operations Instructions, Regulations, 8 C.F.R. § 236.2(b) (1981), Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, the Due Process Clause of the Fifth Amendment to the United States Constitution, and the Protocol.

32. In addition, denial of access to counsel violates the rights of Petitioners and Plaintiffs and the classes they seek to represent, and the HRC, INC., to freedom of speech and the right to assemble and to organize and to petition for redress of grievances, all protected by the First Amendment to the United States Constitution. It also constitutes a prior restraint of information protected by the First Amendment.

33. Petitioners and the members of the class they seek to represent desire access to and representation by counsel during their exclusion proceedings. They did not waive their right to counsel or, in the alternative, did not do so knowingly and understandingly.

34. Plaintiffs and the members of the class they seek to represent desire to have access to and representation by counsel in their exclusion proceedings. They are concerned that defendants will act to deny them access to

counsel in the same manner as they did with respect to Petitioners.

X. COUNT V [RIGHT TO PUBLIC HEARING, OR IN THE ALTERNATIVE, TO PRIVATE HEARING]

35. Petitioners and Plaintiffs and members of their respective classes refer to, reallege, and incorporate by reference as though set forth fully and at length herein paragraphs 1 through 34, *supra.*

36. Petitioners and the members of the class they seek to represent were subjected to hearings, during the week of June 1-5, 1981, that were closed to the public without being advised of their right to request that hearings be opened to the public. They did not knowingly and intelligently waive their right to public hearings. This violated INS Operations Instructions, Regulations, 8 C.F.R. § 236.2(a) (1981), the Due Process Clause of the Fifth Amendment and the Protocol.

37. Petitioners and members of the class they seek to represent were subjected, during the week of June 1-5, 1981, to "mass" hearings in which, rather than being processed one at a time, they were subjected to hearings with several or many other refugees at the same time. As they had not requested that such hearings be public, their right to private hearings under INS Regulations, 8 C.F.R. § 236.2(a) (1981), was violated.

38. On information and belief, Plaintiffs and members of the class they seek to represent are threatened with similar private hearing and/or mass hearings; Plaintiffs would like individual hearings which are opened to the public.

XI. COUNT VI [DENIAL OF NOTICE OF RIGHT TO SEEK POLITICAL ASYLUM]

39. Petitioners and Plaintiffs and members of their respective classes refer to, reallege and incorporate by reference as though set forth fully and at length herein paragraphs 1 through 38, *supra.*

40. Petitioners and Plaintiffs and the members of the classes they represent would like to make political asylum claims. They were not advised that they had the right to do so and did not understand that they had the right to do so. Any "waiver" of their right to file political asylum claims was not knowingly and intelligently made. By failing to advise Petitioners of their right to apply for political asylum, and physically preventing counsel from having access to them to consult with them concerning their right to seek political asylum, Defendants frustrated Petitioners' right to seek asylum, in violation of INS Operations Instructions, Regulations 8 C.F.R. § 236.3 (a) (1981), the Protocol, the Due Process Clause of the Fifth Amendment, and Section 208 of the Immigration and Nationality Act, 8 C.F.R. 1158.

41. On information and belief, Defendants intend to similarly deny Plaintiffs and members of the class they seek to represent an opportunity to apply for political asylum, in violation of these provisions.

XII. COUNT VII [DENIAL OF EQUAL PROTECTION

42. Petitioners and Plaintiffs and members of their respective classes refer to, reallege and incorporate by reference as though set forth fully and at length herein, paragraphs 1 through 41, *supra.*

43. In their treatment of Haitian refugees—with respect to detention, order of conducting exclusion proceedings, the conduct of mass hearings, the denial of fair procedures and notice thereof, and denial of the right of access to counsel—Defendants have followed a "Haitian Program," treating Haitian refugees differently than other refugee groups. No other refugee group has been subjected to procedures or policies of this kind. These procedures and policies violated the right of Petitioners and members of the class they seek to represent to Equal Protection guaranteed by the Due Process Clause of the

Fifth Amendment, and to non-discrimination protected by the Protocol, as these policies and procedures were applied on a class basis to Haitian refugees on the basis of their race and national origin.

44. On information and belief, Defendants intend to apply the same procedures on the basis of race and national origin to Plaintiffs and members of the class they represent, and to no other refugee group, in violation of Plaintiffs' equal protection rights.

XIII. CLASS ACTION ALLEGATIONS

45. Petitioners and Plaintiffs bring this action pursuant to Rule 23(a) and (b)(1)(2) on behalf of themselves and all other persons similarly situated. The two classes consist of the following ascertainable members, all in the custody of Defendants, the names and alien registration numbers of whom can be ascertained from the records of Defendants:

(a) *Petitioners.* The class consists of all Haitian refugees arriving in the United States on or after May 20th, 1981 and applying for entry into the United States who are detained without parole in various INS Detention Facilities and for whom a final order of exclusion and deportation has been entered.

(b) *Plaintiffs.* The class consists of all Haitian refugees arriving in the United States on or after May 20th, 1981, applying for entry into the United States who are held in detention without parole at various INS Detention Facilities, for whom a final non-appealable order of exclusion and deportation has not been entered.

46. Defendants have acted or threatened to act on grounds generally applicable to each of the classes, making appropriate final habeas and final declaratory, injunctive, and mandamus relief with respect to each respective class as a whole.

47. The Plaintiffs are adequate representatives of their respective classes because they have been subjected or

threatened with policies and procedures that are identical with the policies and procedures that the members of their respective classes have been subjected to or are threatened with, and because like members of their respective classes, they seek consultation with and access to counsel, public hearings, and political asylum in the United States.

48. A community of interest exists between Petitioners and members of their class, between Plaintiffs and members of their class, as well as between each of the classes, in that there are questions of law and fact which are common to all. They seek a determination of whether or not the practices and procedures of Defendants are consistent with the APA, with INS Regulations, with the Protocol, and with the Constitution.

49. Individual suits by each member of the respective classes would be impracticable because:

(a) There exist common and identical issues of law and fact for all members of each class and among both classes; whether the policies and procedures of Defendants with respect to exclusion violate INS Operations Instructions, Regulations and Statutes, the APA, the Protocol, and the Constitution.

(b) The number of suits would impose an undue burden upon the courts.

(c) Many members of each class are unaware of their rights and/or are intimidated, due to their status as aliens.

50. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

51. No administrative remedies under the Immigration and Naturalization Act exist which remain to be exhausted that would not be futile or that would provide the relief sought herein.

52. No independent litigation (with the exception of the Habeas Corpus Petition which this Petition and Complaint amends) has, as of the time of filing this suit been brought by any member of the respective classes against defendants' as to the issues raised in this complaint.

53. Petitioners' and Plaintiffs' counsel are experienced in class action litigation and can adequately represent the interests of class members as well as the named Plaintiffs and Petitioners.

XIV. IRREPERABLE INJURY

54. As a result of Defendants' illegal and improper procedures and policies, Petitioners and the members of their class have received final orders of exclusion and deportation. Petitioners will suffer irreperable harm for which there exists no adequate remedy at law if they are deported before the substantial claims they seek to raise herein may be resolved. More importantly, they will be placed in jeopardy of persecution, torture and possibly loss of life upon deportation to Haiti. *See Haitian Refugee Center v. Civiletti*, 503 Supp. 442 (S.D. Fla. 1980).

55. Plaintiffs and members of the class they seek to represent will similarly suffer irreperable harm if they are subjected, as threatened, to Defendants' unlawful procedures and policies.

56. HRC, INC. has suffered and will continue to suffer irreperable injury as a result of Defendants' practices. HRC, INC. suffers irreperable injury as the representative of its Haitian refugee members who have suffered and/or are continuing to suffer the irreperable harm aforementioned. Furthermore, HRC, INC. suffers irreperable harm in its own right as an organization. It has suffered loss of its First Amendment rights to associate and to provide information. It has already suffered the deportation of eleven of its members on or about June 5, 1981, who were subjected to identical procedures and policies. Without injunctive relief, Petitioners and Plaintiffs and members of their classes will similarly be deported.

XV. PRAYER FOR RELIEF

WHEREFORE, Petitioners, Plaintiffs and HRC, INC. pray that this Court:

1. Accepts jurisdiction over this action;

2. Orders that Petitioners and Plaintiffs may maintain this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

3. Declare that the practices, acts, procedures and policies of Defendants herein challenged are unconstitutional, unlawful and invalid for the following reasons:

(a) Defendants conducted preliminary interviews without permitting refugees to be accompanied represented and advised by counsel in violation of 5 U.S.C. § 555(b).

(b) Defendants' policy adopted on or about May 20, 1981, concerning the detention of Haitian refugees, concerning the order of exclusion proceedings, and concerning the conduct of hearings, constituted a rule within the meaning of 5 U.S.C. § 551(4). The Defendants in adopting this rule without proper notice and publication in the Federal Register and without granting the public an opportunity to comment violated 5 U.S.C. § 553.

(c) Defendants' failure to provide Petitioners with adequate notice of their right to counsel and of an exclusion hearing with an opportunity to present evidence, to examine and object to evidence and to cross-examine witnesses, and their threatened refusal to provide plaintiffs with such notice, violated INS Operations Instructions, Regulations, 8 C.F.R. §§ 235.6(a) and 236.2(b) (1981), Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, the Due Process Clause of the Fifth Amendment, and the Protocol.

(d) Defendants' denial of access to counsel with respect to Petitioners, and threatened denial of access to counsel with respect to Plaintiffs, are unlawful in violation of INS Regulations 8 C.F.R. § 236.2(b) (1981), Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, the Fifth Amendment to the United States Constitution, the First Amendment to the United States Constitution, and the Protocol. Moreover, Defendants' planned removal of all hearings from the Immigration Building, South Miami Avenue, to the Detention Facility at Krome Avenue North by denying reasonable access to counsel, is also unlawful as in violation of these provisions.

(e) Defendants' failure to provide adequate notice of the right of Petitioners to seek political asylum and threatened failure to provide such notice to Plaintiffs, in unlawful, in violation of INS Operations Instructions, Regulations, § 236.3(a) (1981), Section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158, the Protocol, and the Due Process Clause of the Fifth Amendment.

(f) Defendants' holding of hearings closed to the public and holding of mass hearings at which more than one refugee was processed was unlawful in violation of INS Operations Instructions, Regulations, 8 C.F.R. § 236.2(a) (1981), the Due Process Clause of the Fifth Amendment and the Protocol, and the threatened application of this procedure to Plaintiffs would be similarly unlawful.

(g) Defendants' application of these procedures and policies to Haitian refugees, but to no other refugee group, violates the Equal Protection guarantees of the Fifth Amendment to the United States Constitution, and the Protocol.

4. Issue preliminary and permanent injunctive and mandatory relief requiring the Defendants and their agents, employees and successors in office:

(a) To refrain from holding preliminary interviews without advising refugees of their right to be accompanied, represented, and advised by counsel during such interviews, and from conducting such interviews without counsel when the refugee asserts a desire to be accompanied, represented or advised by counsel.

(b) To refrain from following its new policies, adopted on or about May 20, 1981, concerning the detention of arriving Haitian refugees, the conduct of exclusion proceedings for such refugees other than in the order of their arrival in the United States, and the application of the new "mass" hearing procedures.

(c) To refrain from conducting exclusion hearings without giving prior adequate notice of the right to coun-

sel and of the right to a reasonable opportunity to present evidence, to examine and object to evidence, and to cross-examine adverse witnesses.

(d) To refrain from interfering with reasonable access by counsel and by employees of HRC, INC. seeking to assert their right to convey information and to associate.

(e) To refrain from relocating exclusion and asylum hearings from the Immigration Building, South Miami Avenue, Miami to the INS Detention Facility at Krome Avenue.

(f) To refrain from conducting "mass" exclusion proceedings.

(g) To refrain from applying policies or procedures concerning exclusion to Haitian refugees that are not applied to other refugee groups.

5. Issue permanent relief in the nature of mandamus requiring the Defendants and their agents, employees and successors in office:

(a) To advise Haitian refugees of their right to be accompanied, represented, and advised by counsel at preliminary interviews, and to permit such refugees to enjoy the assistance of counsel at such interviews.

(b) To apply the policies with respect to parole and order of conducting exclusion proceedings, and the procedures for the conduct of exclusion hearings that prevailed prior to May 20, 1981, unless and until changed by rulemaking procedures conforming with 5 U.S.C. § 553.

(c) To provide adequate notice prior to exclusion proceedings of the right to counsel and of the right to a reasonable opportunity to present evidence, to examine and object to evidence, and to cross-examine adverse witnesses.

(d) To permit reasonable access to counsel prior to and at exclusion and asylum hearings, and to continue to hold exclusion and asylum hearings in the immigration building, South Miami Avenue, Miami, Florida, or at such other locations in the Downtown Miami area that do not interfere with reasonable access to counsel.

(e) To permit public hearings at the request of refugees, and to hold individual hearings rather than "mass" hearings.

(f) To provide refugees with notice of their right to seek political asylum.

6. Award Plaintiffs and Petitioners and the members of their respective classes their court costs and attorney's fees in the prosecution of this lawsuit.

7. Order all other relief that this Court deems just, necessary and proper.

Respectfully Submitted,

IRA J. KURZBAN, ESQ.
National Emergency Civil
Liberties Committee and
Haitian Refugee Center, Inc.
Kurzban and Kurzban, P.A.
Suite 901, 700 Brickell Avenue
Miami, Florida 33131
Telephone: 305/371-0268

VERA WEISZ, ESQ. and
STEVEN FORESTER, ESQ.
Haitian Refugee Center, Inc.
32 N.E. 54th Street
Miami, Florida 33137
Telephone: 305/757-8538;
757-8781

BRUCE J. WINICK, ESQ.
American Civil Liberties
Foundation of Florida, Inc.
Post Office Box 248087
Coral Gables, Florida 33124
Telephone: 305/284-2971

IRWIN P. STOTZKY, ESQ.
Post Office Box 248087
Coral Gables, Florida 33124
Telephone: 305/284-3041

ATTORNEYS FOR PETITIONERS
AND PLAINTIFFS

By /s/ Ira J. Kurzban
IRA J. KURZBAN

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Case No. 81-1260-CIV-ALH

MARIE LUCIE JEAN, HEROLD JACQUES, and LUCIEN LOUIS, on behalf of themselves and all others similarly situated; WILNER LUBERISSE and JOB DESSIN, on behalf of themselves and all others similarly situated; and THE HAITIAN REFUGEE CENTER, INC., a non-profit membership corporation, on behalf of itself and its members, PETITIONERS AND PLAINTIFFS

vs.

DORIS MEISSNER, Acting Commissioner, Immigration & Naturalization Service; JOE G. HOWERTON, District Director, Immigration & Naturalization Service, District VI; LEE ROWLAND, Assistant District Director For Deportation Immigration & Naturalization Service, District VI; FRED ALEXANDER, Officer In Charge, Krome Avenue North Detention Facility; THE IMMIGRATION & NATURALIZATION SERVICE; WILLIAM FRENCH SMITH, Attorney General of The United States, RESPONDENTS AND DEFENDANTS

RETURN TO AMENDED PETITION FOR HABEAS CORPUS AND MOTION TO HAVE PARTIES DROPPED AND CLAIMS SEVERED IN THE COMPLAINT FOR DECLARATION INJUNCTIVE AND MANDATORY RELIEF

The Federal Respondents hereby file their return to the amended petition for habeas corpus pursuant to 28 U.S.C. § 2243 and state their reliance on the grounds asserted for dismissal of the petition in their prior return entitled Motion to Dismiss filed June 12, 1981 and trial memo-

randum filed June 17, 1981, and upon the facts presented in the Administrative Record filed with the Court in the form of tapes and transcripts of exclusion hearings conducted by INS during June 1 through June 4, 1981 involving eighty-five Haitians found to be excludable. Respondents, upon the facts presented as to the basis for exclusion of the petitioners and those they purport to represent and upon the legal arguments for dismissal contained in respondents' prior memorandum hereby urge the Court to dismiss or deny the petition for habeas corpus and allow the United States to remove those persons found properly excludable from the country.

Further, respondents hereby move the Court, pursuant to Rule 21 of the Federal Rules of Civil Procedure for an order dropping the plaintiffs and those they purport to represent and for severance of the claims contained in the Complaint for Declaratory, Injunctive and Mandatory Relief.

Respectfully submitted,

ATLEE W. WAMPLER, III
UNITED STATES ATTORNEY

By: /s/ Richard A. Marshall, Jr.
RICHARD A. MARSHALL, JR.
ASSISTANT U.S. ATTORNEY
155 So. Miami Avenue
Miami, FL 33130

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-CIV-ALH

LUCIAN LOUIS, JEAN LOUIS, SERVEBIEN, PIERRE SILIEN, SERGE VERDIEU, MILFORT VILGARD, and JOEL CASIMIR, on behalf of themselves and all others similarly situated; and THE HAITIAN REFUGEE CENTER, INC., a non-profit membership corporation, on behalf of itself and its members, PLAINTIFFS

vs.

DORIS MEISSNER, Acting Commissioner, Immigration and Naturalization Service; JOE HOWERTON, District Director, Immigration and Naturalization Service, District VI; LEE ROWLAND, Assistant District Director for Deportation, Immigration and Naturalization Service, District VI; FRED ALEXANDER, Officer in Charge, Krome Avenue North Detention Facility; THE IMMIGRATION AND NATURALIZATION SERVICE; WILLIAM FRENCH SMITH, Attorney General of the United States, DEFENDANTS.

SUPPLEMENTAL PLEADING AND SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDATORY RELIEF—CLASS ACTION

1. The above-captioned substitutes for the caption contained on page 1 of the Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory, Injunctive, and Mandatory Relief—Class Action ("Complaint").

2. On or about August 10, 1981, this Court granted defendants' Motion to Vacate petitioners' final orders of exclusion and to remand the Immigration and Naturalization Service. As a result, the class designated as "petitioners" in the Complaint, and defined as refugees for

whom final orders of exclusion and deportation have been issued, is non-existant and has been absorbed into the class designated as "plaintiffs" in the Complaint, and defined as refugees who have not as yet been issued final orders of exclusion and deportation. As a result, allegations in the Complaint concerning petitioners should now refer exclusively to plaintiffs.

3. Marie Lucie Jean and Herold Jacques petitioners and plaintiffs in the Complaint have, since the filing of the Complaint, been paroled into the community and are no longer in detention. They are accordingly deleted as parties.

4. Lucien Louis, one of the original petitioners, who testified in these proceedings on June 24, and June 29, 1981, was, since the giving of his testimony, released on parole into the community and is no longer held in detention. However, as he has been subjected to a preliminary interview or deferred inspection without being permitted to be accompanied, represented, and advised by counsel, and as he is subject to having his parole revoked at any time, to being placed once again in detention, and to being subjected to unlawful exclusion procedures, he is retained as a party hereto on behalf of himself and all others similarly situated. Plaintiffs Wilner Luberisse and Job Dessin have, since the filing of the Complaint, been released on parole into the community and are no longer in detention. However, because they have been subjected to deferred inspections without the right to be accompanied, represented, or advised by counsel, and as they are subject to having their parole revoked, to being restored to detention, and to being subjected to unlawful exclusion procedures, they are retained as parties.

5. The following six parties are substituted for the two parties deleted in paragraph 3, *supra*, and the following shall substitute for paragraph 6 contained at pages 6-7 in the Complaint:

a) Plaintiffs Jean Louis Servebien is a Haitian refugee who arrived in the United States in July, 1981, and

applied for entry into this country. He was held for deferred inspection and is currently detained in the INS Krome North Detention Facility without parole or bond. He was not given an orientation session to advise him of his rights. He was subjected to a preliminary interview or deferred inspection by INS employees without being accompanied, represented or advised by counsel and without being advised of his right to do so. He was giving an exclusion hearing on August 11, 1981, before Immigration Judge Foster. Prior to this hearing, he was advised by INS employees that if he had any problems he could get a lawyer. He was not, however, told that he would go before a judge or that the purpose of such a proceeding would be to deport him to Haiti. He was given a I-122 form in English only, and was not provided notice of his right to a hearing at which he would have a reasonable opportunity to present evidence, to examine and object to evidence, and to cross-examine witnesses against him. He was never advised by INS officials that he could ask for political asylum. Had he known that he could apply for political asylum, he would have done so at the earliest possible time, because he is afraid that he would be persecuted if returned to Haiti. Although he has been held at the Krome North Detention Facility since July 6, 1981, he has been unable to have access to an attorney or to his relatives or friends who live in Miami because he has no money to use the telephones at the Krome Facility. At his hearing on August 11, 1981, his attorney, Steven Forester, sought a continuance from Judge Foster on the basis that he was scheduled for two other hearings, before judges Scroope and Nail at the same time. Judge Foster denied this Motion. As a result of this simultaneous scheduling, plaintiff Servebien's attorney was absent from much of the hearing. Attorney Forester was able to return to the hearing only at its conclusion to find that Judge Foster had issued an order of exclusion. Mr. Forester then moved to appeal the order of exclusion. Until his attorney advised him, plaintiff Servebien did not

understand what had occurred at the hearing and did not know that the Judge had determined that he would be deported to Haiti. Mr. Servebien's immigration number is A 26006885.

b) Plaintiff Pierre Silien is a Haitian refugee who arrived in the United States on July 8, 1981, and applied for entry into this country. He was held for deferred inspection and is currently detained in the INS Krome North Detention Facility without parole or bond. He was subjected to a preliminary interview or deferred inspection by INS employees without being accompanied, represented, or advised by counsel, and without being advised of his right to do so. He was given an I-122 form in English only. He was not, however, advised of his right to a hearing at which he would have a reasonable opportunity to present evidence, to examine and object to evidence, to cross-examine witnesses against him. He was not given notice of the purpose of his detention and hearing, and did not understand that the hearing was to determine whether he would be deported to Haiti. He was not advised of his right to apply for political asylum. Had he been advised of this right, he would have applied for asylum at the earliest possible time because of his belief that, if returned to Haiti, he will be beaten, imprisoned, and perhaps killed because he is considerd an enemy and a traitor. Since his detention at the Krome North Detention Facility, plaintiff Silien has been unable to use a telephone because he does not have any money. He was not given an INS "orientation". At his hearing on August 4, 1981 before Judge Scroope, plaintiff Silien's attorney sought a continuance on the basis that he was scheduled to be in two other hearings, one before Judge Nail and one before Judge Foster, at the same time. Judge Scroope denied the continuance. As a result, Steven Forester, plaintiff Silien's attorney, could not be present for a large part of his hearing. Mr. Forester returned to the hearing to find the hearing completed and an order of exclusion issued during Mr. Forester's absence. Judge Scroope

asked plaintiff Silien if he wanted to go to another court or to appeal to another court. Silien replied, "no, because I already have a lawyer, and I want to continue with him." Silien did not understand that the hearing was over and did not understand the notion of an appeal, rather than going to another court, Silien told the Judge he wanted to continue with his lawyer in this Court. On August 6, 1981 Mr. Forester filed a Notice of Appeal, or in the alternative, a Motion to Reopen. On or about August 18, 1981, plaintiff Silien's case was reopened. Plaintiff Silien has been given until September 1, 1981, to submit a political asylum application, and his case has been set for a hearing at 9:00 a.m. on that date. Plaintiff Silien's immigration number is A26006986. He is a member of the Haitian Refugee Center, Inc.

c) Plaintiff Serge Verdieu is a Haitian refugee who arrived in the United States in early July, 1981, and applied for entry into this country. He was held for deferred inspection and is presently detained in the INS Krome North Detention Facility without parole or bond. He was subject to a preliminary interview or deferred inspection by INS employees without being accompanied, represented or advised by counsel, and without being advised of his right to do so. He was given an I-122 form in English only and never orally read to himsin Creole. He was not advised of the nature of the hearing, that it could result in deportation, or that at the hearing he would have a reasonable opportunity to present evidence, to examine and object to evidence and to cross-examine witnesses against him. On August 4, 1981, he was given a hearing before Judge Scroope without a prior orientation. Just before the hearing began, plaintiff Verdieu's attorney, Steven Forester, sought a continuance from Judge Scroope on the basis that he had been scheduled for hearings in other cases before Judges Nail and Foster at the same time. Judge Scroope refused to grant such continuance. As a result, Mr. Forester was unable to attend the hearing. He returned to find Judge Scroope dictating

his order of exclusion and decision. Plaintiff Verdieu was not advised by the Judge of his right to appeal or did not understand that he had such a right. Mr. Forester filed a Notice of Appeal or in the alternative, a Motion to Reopen on August 4, 1981, which has not as yet been acted upon. Plaintiff Verdieu was never advised of his right to file an asylum application. Had he been so advised, he would have filed such an asylum application at the earliest possible time because of his belief that, if returned to Haiti, he will be killed or inprisoned, beaten, and tortured because he is considered a "kamokuin", an enemy of the Duvalier government. Plaintiff Verdieu's INS number is A26006939. He is a member of the Haitian Refugee Center, Inc.

d) Plaintiff Milfort Vilgard is a Haitian refugee who arrived in the United States on or about August 2, 1981, and applied for entry into this country. He was held for deferred inspection and is currently detained in the INS Krome North Detention Facility without parole or bond. On August 3, 1981, he was given a preliminary interview or deferred inspection by INS employees without being accompanied, represented, or advised by counsel, and without being advised of his right to do so. He was given a form I-122 in English only, which was not read to him. He was not advised of the nature of the hearing or that it could result in deportation, and was not advised that he would be given a hearing at which he would have a reasonable opportunity to present evidence, to examine and object to evidence, and to cross-examine witnesses against him. He was not given an orientation session. He had sought representation by attorneys for the Haitian Refugee Center, Inc. Although his exclusion hearing has not as yet been scheduled, he is concerned that his right to representation by counsel will be frustrated by the simultaneous scheduling of his hearing with those of others represented by his attorney. He has not been advised by INS officials of his right to file a political asylum claim. Had he been so advised, he would have filed an asylum

application at the earliest possible time because of his belief that, if returned to Haiti, he would be beaten, jailed or killed. Prior to his leaving Haiti, he had previously planned to leave, but his plan was discovered by the security police forces. He was pursued by the police and went into hiding at La Grand Gonave Island. Had he been cought, he would have been killed by the security police. He subsequently fled from La Gonave Island to this country. His immigration number is A26008417. He is a member of the Haitian Refugee Center, Inc.

e) Plaintiff Joel Casimir, is a Haitian refugee who arrived in the United States on July 4, 1981, and applied for entry into this country. He was held for deferred inspection and detained originally at the Krome North Detention Facility without parole or bond. On July 5, 1981, he was subjected to a preliminary interview or deferred inspection by INS employees without being accompanied, represented, or advised by counsel and without being advised of his right to do so. On July 21, 1981, he was moved to the INS Detention Facility at Big Springs, Texas. He was not given an orientation session in Texas and the I-122 form he was served with was in English only. He did not understand the nature of the hearing that he would be subjected to, and that it could result in deportation to Haiti. He was not advised that he would have a hearing at which he would have a reasonable opportunity to present evidence, to examine and object to evidence and to cross-examine witnesses against him. He was given a preliminary hearing in Texas in front of an Immigration Judge in which he was asked questions to which he made responses. When asked if he wanted an attorney, he replied in the affirmative. He was advised that his hearing was scheduled for August 27, 1981, he is not represented by an attorney although an attorney for West Texas Legal Services—Midland, advised him that he would represent him for the limited purpose of seeking to have his hearing moved to Miami. Plaintiff Casimir was never advised of his right to make a political asylum ap-

plication. Had he been so advised, he would have made an asylum application at the earliest possible time in view of his belief that, if returned to Haiti, he would be arrested because he left the country illegally. Plaintiff Casimir's immigration number is A26006690.

f) Plaintiff Prophete Talleyrand is a Haitian refugee who arrived in the United States on or about July 4, 1981, and applied for entry into this country. He was held for deferred inspection and was initially detained at the INS Krome North Detention Facility without parole or bond. He was subjected to a preliminary interview or deferred inspection by INS employees without being accompanied, represented, or advised by counsel, and without being advised of his right to do so. On or before August 20, 1981, plaintiff Talleyrand's family members residing in Miami, Philistin Talleyrand and Thermite Talleyrand, members of the Haitian Refugee Center, Inc., telephone the Center to request representation for plaintiff Talleyrand. On August 20, 1981, attorney Steven Forester filed a G-28 Notice of Appearance Form for Mr. Talleyrand. On or about August 20, 1981, plaintiff Talleyrand was moved by INS officials to Fort Allen, Puerto Rico. Plaintiff Talleyrand's immigration number is A26007171.

Respectfully submitted,

IRA J. KURZBAN, ESQ.
National Emergency Civil
Liberties Committee and
Haitian Refugee Center, Inc.
Kurzban and Kurzban, P.A.
Suite 961, 700 Brickell Avenue
Miami, Florida 33131
Telephone: 305/371-0268

VERA WEISZ, ESQ.
Haitian Refugee Center, Inc.
32 N.E. 54th Street
Miami, Florida 33137
Telephone: 305/757-8538

BRUCE WINICK, ESQ.
American Civil Liberties
Foundation of Florida, Inc.
P.O. Box 248087
Coral Gables, Florida
Telephone: 305/284-3031

IRWIN STOTZKY, ESQ.
P.O. Box 248087
Coral Gables, Florida 33124
Telephone: 305/284-3031

KENNETH PANZER, ESQ.
Legal Services of
Greater Miami, Inc.
P.O. Box 47000 N
Miami, Florida 33147

ATTORNEYS FOR PLAINTIFFS

By _____
IRA J. KURZBAN

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
S. D. FLORIDA
MIAMI DIVISION

No. 81-1260-Civ-ALH

LUCIEN LOUIS, ET AL., PLAINTIFFS

v.

DORIS MEISSNER, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

Sept. 30, 1981

ORDER GRANTING TEMPORARY RESTRAINING ORDER

HASTINGS, District Judge.

THIS CAUSE, came on to be heard on plaintiffs' Renewed Motion for Temporary Restraining Order. Testimony was taken on September 8 and 9, 1981. Based on this and prior testimony, plaintiffs previously filed motions for temporary restraining order and for preliminary injunction, plaintiffs' memoranda in support of same, affidavits submitted by both parties, defendants' responses to interrogatories and requests for admissions, and documents placed in evidence, this Court finds that a sufficient showing has been made by plaintiffs to meet the requirements for a temporary restraining order.

THE STANDARDS FOR A TEMPORARY RESTRAINING ORDER

There are four criteria which the moving party must meet in order to justify issuance of a temporary restraining order or preliminary injunction:

1. A substantial likelihood that the movant will eventually prevail on the merits;
2. The movant will suffer irreparable injury unless the injunction is issued;
3. The injury to the movant outweighs whatever danger the proposed injunction may cause the party or parties opposing the injunction, and that;
4. The injunction, if issued, would not be adverse to the public interest.

Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974); *Di Giorgio v. Causey*, 488 F.2d 527 (5th Cir. 1973); *State of Texas v. Seatrain International, S. A.*, 518 F.2d 175 (5th Cir. 1975).

It is also established in this Circuit that no particular quantum of proof is required as to each of the four criteria, but that the trial court should utilize a balancing-type approach in reviewing a preliminary injunction or temporary restraining order application. *State of Texas v. Seatrain International, S. A., supra,* at 180 ("none of the four prerequisites has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus."); *Siff v. State Democratic Executive Committee*, 500 F.2d 1307 (5th Cir. 1974). While the grant of a preliminary injunction would be inappropriate where the movant party has little or no chance of success on the merits, the importance of this requirement varies with the relative balance of threatened hardships facing each of the parties. *Canal Authority of the State of Florida v. Callaway, supra,* at 576. Moreover, a showing that plaintiffs will be more severely prejudiced by a denial of the temporary restraining order or injunction then will defend-

ants should it be granted, lessens the standard likelihood of success that must be met. *Id.*; See generally, Lubsdorf, The Standard for Preliminary Injunction, 91 *Harv.L.Rev.* 525 (1978).

While the plaintiffs must establish all four factors delineated in *Canal Authority*, the crucial question is whether preservation of the status quo is necessary in order to protect the court's ability to render a meaningful decision on the merits. If a failure to grant temporary relief, will allow the defendant to harm the plaintiff in such a way that the court's ultimate decision in the plaintiff's favor becomes mere useless dicta, then a temporary restraining or preliminary injunction should issue.

THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR UNDERLYING CLAIMS

In order to grant a temporary restraining order or a preliminary injunction in a case such as this, raising a number of separate claims for relief, it is sufficient if this court, finds that plaintiffs are likely to succeed on *any* of their claims, *See Tenants for Justice v. Hills*, 413 F.Supp. 389 (Ed.Pa. 1975), so long as the ultimate victory on this claim could be rendered relevant by the defendants' actions in the interim.

DENIAL OF ACCESS TO COUNSEL

On July 17, 1981, defendants began to remove members of plaintiffs' class out of the State of Florida and to various INS Detention Facilities located throughout the country. Approximately seven hundred of these refugees have been transported to Fort Allen, Puerto Rico, a former army base located in a remote area of the Island. Approximately fifty refugees have been transferred to Morgantown, West Virginia, located in the Northern West Virginia coal fields and having an approximate population of thirty thousand. An additional one hundred refugees were sent to Big Springs, Texas, a semi-desert

city of approximately twenty-five thousand people, described as being about two hundred sixty miles west of Fort Worth, three hundred fifty miles east of El Paso, and "really not near anything." Approximately two hundred refugees were transferred to Lexington, Kentucky; approximately forty were transferred to Lake Placid, New York; approximately one hundred twenty were transferred to Otisville, New York; and approximately eighty-five were transferred to Brooklyn, New York. Approximately one thousand of these refugees remain in the Krome North Detention Facility, in Miami, Florida.

Having made a long and perilous journey on the seas to Southern Florida, these refugees, seeking the promised land, have instead been subjected to a human shell game in which the arbitrary Immigration and Naturalization Service has sought to scatter them to locations that, with the exception of Brooklyn are all in desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any, Creole interpreters. In this regard, INS officials have acted as haphazard as the rolling seas that brought these boat people to this great country's shores. Indeed, even though INS officials have been rudderless in the enunciation and application of an immigration policy, when they decided to move the Haitians to these remote areas, they acted with laser-like precision. These refugees were removed from Miami, a city with a substantial immigration bar as well as volunteer lawyers from various organizations expressing an interest in representing these refugees. Miami also has a large Haitian population, and as a result, many Creole speaking individuals able to serve as translators to facilitate the attorney/client relationship, as well as community support groups and family members able to assist these refugees in their exclusion proceedings. From this relatively advantageous location from the prospective of the refugees, INS has distributed them to remote areas lacking attorneys with experience in immigration law, or for that matter, any attorneys at all

willing to represent them. Moreover, these areas lack Creole speaking individuals able to act as translators. For example, the court heard testimony that there are no immigration lawyers in West Virginia, and that there are more Miami attorneys listed as specialists in immigration law in the Miami telephone book than there are attorneys in all of Monongolia County, (Morgantown) West Virginia.

Section 292 of the Immigration and Nationality Act, 8 U.S.C. § 1362, as well as INS Regulations, 8 C.F.R. § 236.2(b) provide that individuals subjected to exclusion proceedings have the right to representation by counsel not at government expense. Although Congress did not provide appointed counsel, Congress clearly intended that individuals in this situation be permitted representation by attorneys willing to provide legal services. By transferring these refugees to desolate, remote areas, wholly lacking in counsel and/or Creole translators, INS has thwarted the statutory and regulatory rights of these refugees to representation in their exclusion proceedings.

In addition, the testimony established that at least in some instances, the notice concerning attorneys provided these refugees in the various locations, which purported to list names, addresses, and telephone numbers of attorneys able to provide representation, were inaccurate. In some instances, they contained stale information listing attorneys' telephone numbers, and addresses where they no longer had offices. On other occasions these lists were misleading, listing names of organizations which had publicly stated their inability to represent these refugees. In some locations, the testimony established that although telephone numbers were provided, there were no available telephones in the detention facility. The court notes the general unavailability of telephones in these facilities, and the obvious problems engendered by providing telephone numbers of attorneys in cities requiring long distance telephone calls.

THE I-122 FORM

The charging instrument in an exclusion proceeding is the I-122 form. Its function is to notify individuals that they are about to be subjected to an exclusion proceeding, of their legal rights at such a proceeding, of the nature of the proceeding, and of the consequences thereof. The defendants have conceded that the I-122 form provided to Haitian refugees is in English only, and is not on its face translated into Creole. Although the government contends that all translations into Creole are made upon the service of I-122 form, the testimony and affidavits submitted establish that such translations were frequently omitted. Moreover, this Court held a six day hearing in June, 1981 that established that even in Miami, where INS Creole translators are presumably proficient, the translations at these proceedings are woefully inadequate. Many of the key words necessary to provide adequate notice were not translated into Creole, but were rather translated into the French equivalent words that were unintelligible to these poorly educated individuals. The court is thus greatly concerned with the INS practice of in effect leaving the adequacy of notice to the varying abilities of translators throughout the country. In view of the negligible cost of providing written translations that would assure uniformity and accuracy in the provision of notice, this Court finds that plaintiffs have demonstrated the likelihood of succeeding on this point.

NOTICE OF THE RIGHT TO FILE AN ASYLUM CLAIM

Section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, as well as INS Regulations, 8 C.F.R. 208 *et. seq.* provide an elaborate procedure for the making of a political asylum claim. Defendants concede that they do not advise individuals of their rights under these provisions to file political asylum claims. Without the provision of such notice, the rights of Haitian refugees to

file such claims, given their language literacy and educational problems, would be rendered meaningless. Not only does the INS have a statutory and regulatory obligation to give fair consideration to claims for political asylum, but treaty obligations to which this country is a party, the United Nations Convention and Protocol for the Status of Refugees, impose a parallel duty. The failure of INS to provide notice to the Haitians of their right to apply for political asylum at an early time also frustrates the Haitians' regulatory right to invoke the determination of the INS District Director on this issue, as provided in 8 C.F.R. §§ 208.1, 208.8. The Court thus finds that plaintiffs have demonstrated their likelihood of success on this issue.

OTHER ISSUES

Plaintiffs raise a number of other issues concerning the processing of Haitian refugees in exclusion proceedings, the order in which such processing is occurring and the fact that these refugees are held in detention rather than released to the community. Although the court has heard extensive legal argument on some of these points, and although plaintiffs have briefed them, the court, in view of its above findings, at this point finds it unnecessary to address these issues.

IRREPARABLE HARM

Plaintiffs assert that without the temporary restraining order they seek, they will suffer irreparable harm in a number of ways. As the Fifth Circuit has held in *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974), "[a] preliminary injunction may be issued to protect the plaintiff from irreparable injury and to preserve the district court's power to render a meaningful decision after trial on the merits." The "primary justification" for granting preliminary injunctive relief, according to the Fifth Circuit, "is to preserve the court's ability to render a meaningful decision on the merits." *Id.* at 573. This Court finds that a temporary restraining order is necessary to preserve its ability to render a meaningful decision.

Without an injunction against the commencement or continuation of exclusion proceedings in these remote areas for unrepresented Haitians, these refugees will soon receive final orders of exclusion. Upon receiving such an order, they will, by that very fact, be excluded from the class, which is defined in terms of refugees who have *not* received final, non-reviewable order of exclusion. Not only will they be excluded from the class, and therefore be beyond the remedial powers of this Court, but under 8 U.S.C. § 1105a(b), upon the receipt of a final order of exclusion, the sole and exclusive judicial remedy is by means of habeas corpus. As a result, this statutory restriction on judicial review may remove this Court's ability to act at all for those receiving final order. Although this Court believes that its certification of the class is itself sufficient to protect all class members in their rights to the procedures that this Court might ultimately declare to be their due, § 1105a(b) could conceivably be construed in a way to divest this Court of its ability to render a meaningful decision on the merits that would accrue to the benefit of those receiving final orders of exclusion.

In addition, the testimony has amply established that many of the refugees in the remote areas are unrepresented and are unlikely to be represented, either at their exclusion proceedings, at any possible appeal to the Board of Immigration Appeals, or to obtain judicial review of the issuance of a final order of exclusion by habeas corpus. Without such representation, a refugee receiving a final order, will thus be subject to immediate exclusion and deportation from this country. Obviously, the removal from the country of any of the members of the class, will render it impossible for these individuals to receive any benefit from this Court's ultimate adjudication on the merits. Indeed, in an earlier point in these

proceedings, INS deported eleven refugees to Haiti pursuant to procedures that the government later agreed were faulty. Unfortunately, the government's concession came too late to assist these eleven individuals. It is to prevent a similar problem that this Court must enjoin the deportation of unrepresented class members. Finally, although the court makes no specific findings on this point, the court does note the extensive findings made by Judge King in *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442 (S.D.Fla.1980), concerning the possibility of persecution and torture of refugees returned to Haiti.

THE THREATENED INJURY TO PLAINTIFFS OUTWEIGHS ANY CONCEIVABLE HARM TO DEFENDANTS RESULTING FROM THE GRANT OF A TEMPORARY RESTRAINING ORDER

The only harm that could result to defendants as a result of the issuance of a temporary restraining order consists of administrative inconvenience inherent in delaying the holding of hearings for the exclusion of refugees. Such administrative inconvenience is, of course, of no consequence in comparison to the potential losses which the plaintiffs may suffer if temporary relief is not granted. The government does not dispute that under its own statute and regulations, hearings are required. Plaintiffs are not asking that this Court impose on defendants a new, disruptive burden, but only that it delay the continuance of the procedure which must occur in any event. Since the government has not yet carried out hearings for many Cuban and Haitian refugees who arrived prior to the members of the class, it cannot credibly argue that immediate hearings for class members are necessary to avoid injury to it.

Moreover, if the planned hearings are legally defective—and this Court has serious concern as to their adequacy—then they must ultimately be repeated. It thus seems prudent for this Court expeditiously to adjudicate

the substantial matters raised by plaintiffs concerning the procedures required by law in exclusion proceedings and avoid the wasted effort of requiring the government merely to repeat inadequate hearings.

THE PUBLIC INTEREST WILL NOT BE DISSERVED

As this Court intends expeditiously to conclude this matter, the public interest will not be disserved by the short restraint on the government going forward in exclusion proceedings for unrepresented refugees. Indeed, the public interest would be served by clarifying the procedural requirements that defendants must adhere to so that they may go about their statutory duty of excluding unlawful aliens in a uniform manner consistent with the requirements of law. "Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations even when they are about to occur or prevent their continuance after they have begun. *Walling v. Brooklyn Braid Co., Inc.*, 152 F.2d 938 (2nd Cir. 1945).

Thus a temporary restraining order would best serve the public's interest. The public's interest is not served by continued acts violative of the law. Nor is it served by deportations which effectively make it impossible for the government to correct its errors and to see that justice is done. Under our system of law, the government owes these refugees the obligation fully to comply with all statutory, regulatory and treaty rights which these individuals may possess. The court has heard sufficient testimony to conclude that plaintiffs have made a substantial showing that, at least in some regards, defendants are forwarding the legal rights of these refugees. Moreover, based on testimony and affidavits submitted by plaintiffs, this Court is seriously concerned that some of these individuals may be deportation cases, rather than exclusion cases, and therefore entitled to full constitu-

tional as well as statutory and regulatory protections. In addition, some may well be Cuban-Haitian entrants, and therefore improperly subjected to exclusion proceedings at this time. Finally, a number of the refugees transferred out of Florida have had attorneys from the Haitian Refugee Center, Inc. file notice of appearances (Form G-28) on their behalf. This constitutes a direct and substantial interference with an ongoing attorney-client relationship. Issues such as these would in effect be buried by the continuation or commencement of exclusion proceedings for unrepresented Haitian refugees.

CONCLUSION

Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED:

That defendants and their agents, employees, and successors, are hereby restrained from commencing or continuing exclusion proceedings for class members held at Fort Allen, Puerto Rico, Big Springs, Texas, Morgantown, West Virginia, and Lexington, Kentucky, who are unrepresented. In addition, defendants, their agents, employees, and successors, are restrained and enjoined from deporting any member of the class.

Based on the representation of government counsel that exclusion proceedings will not be commenced or continued for unrepresented Haitian refugees at the additional detention facilities, this Court finds it unnecessary formally to enjoin the government from holding such hearings for unrepresented Haitian refugees held at the Krome North Detention Facility, Miami, Florida, as well as INS Detention Facilities in Lake Placid, New York, Otisville, New York, Brooklyn, New York and any other INS Detention Facility.

ORDER

SUA SPONTE, the Court finds that the Temporary Restraining Order entered this 30th day of September, 1981 NUNC PRO TUNC to September 9, 1981 has dis-

solved. In order to maintain the status quo and to be able to render a meaningful decision on the merits (trial on the merits of this cause has previously been advanced with the hearing on the preliminary injunction, Rule 65 (a)(2)) said Temporary Restraining Order is hereby converted into and to be continued as a Preliminary Injunction. Defendants, by and through their agents and employees, are hereby enjoined from deporting all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the U.S. and who are presently held in detention pending exclusion proceedings at various *INS* detention facilities, for whom an order of exclusion has not been entered and who are unrepresented by counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-Civ-ALH

LUCIEN LOUIS, ET AL., PLAINTIFFS

vs.

DORIS MEISSNER, ET AL., DEFENDANTS

[Filed Oct. 6, 1981]

ORDER

SUA SPONTE, the Court finds that the Temporary Restraining Order entered this 30th day of September, 1981 NUNC PRO TUNC to September 9, 1981 has dissolved. In order to maintain the status quo and to be able to render a meaningful decision on the merits (trial on the merits of this cause has previously been advanced with the hearing on the preliminary injunction, Rule 65 (a)(2)) said Temporary Restraining Order is hereby converted into and to be continued as a Preliminary Injunction. Defendants, by and through their agents and employees, are hereby enjoined from deporting all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the U.S. and who are presently held in detention pending exclusion proceedings at various *INS* detention facilities, for whom an order of exclusion has not been entered and who are unrepresented by counsel.

DONE AND ORDERED in Chambers in Miami, Florida this 2nd day of October 1981.

/s/ Alcee L. Hastings
ALCEE L. HASTINGS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-Civ-EPS

LUCIEN LOUIS, ET AL., PLAINTIFFS

vs.

DORIS MEISSNER, ET AL., DEFENDANTS

ANSWER

Defendants, Doris Meissner, Joe Howerton, Lee Rowland, Fred Alexander, the Immigration and Naturalization Service, and William French Smith, by their attorney, Atlee W. Wampler, III, United States Attorney for the Southern District of Florida, answer plaintiffs' Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory, Injunctive, and Mandatory Relief-Class Action and Supplemental Pleading, and Second Amended Complaint for Declaratory Injunctive and Mandatory Relief Class Action (the "Complaint") as follows:

1. Paragraph 1 of the Complaint purports to summarize the allegations that follow and, as such, requires no response. To the extent that a response may be required, paragraph 1 is denied.

2. Paragraph 2 of the Complaint alleges conclusions of law and, as such, requires no response. To the extent that a response may be required, paragraph 2 is denied.

3. Deny paragraph 3 of the Complaint except admit that defendants Joe Howerton, Lee Rowland, and Fred Alexander reside in the Southern District of Florida.

4. Deny knowledge or information sufficient to form a belief as to the truth or falsity of paragraph 4 of the Complaint.

5. Deny paragraph 5 of the Complaint upon information and belief except admit that plaintiff Lucien Louis is a Haitian alien who has been paroled and affirmatively allege that he attempted to enter the United States illegally on or after May 20, 1981 and that the facts and circumstances with respect to his individual case are set forth in the applicable administrative record.

6. Deny paragraph 6 of the Complaint, upon information and belief except admit that plaintiffs Jean Louis Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard, Joel Casimir, and Prophete Talleyrand are Haitian aliens and affirmatively allege that on or after July 1, 1981 they attempted to enter the United States illegally and that the facts and circumstances with respect to their individual cases are set forth in the applicable administrative records.

7. Deny paragraph 7 of the Complaint, except admit that defendant Doris Meissner is the Acting Commissioner of the Immigration and Naturalization Service ("INS") and affirmatively allege that her duties and responsibilities are defined by applicable law and regulations.

8. Deny paragraph 8 of the Complaint, except admit that defendant Joe Howerton is the District Director of INS District VI and affirmatively allege that his duties and responsibilities are defined by law and regulations.

9. Deny paragraph 9 of the Complaint, except admit that defendant Lee Rowland is the Assistant District Director for Deportation in INS District VI and affirmatively allege that his duties and responsibilities are defined by applicable law and regulations.

10. Deny paragraph 10 of the Complaint.

11. Deny paragraph 11 of the Complaint except admit that defendant William French Smith is the Attorney General of the United States and affirmatively allege that his duties and responsibilities are defined by applicable law and that as concerns his delegation of authority in

the area of immigration plaintiffs are referred to 8 C.F.R. § 2.1.

12. Deny paragraph 12 except admit that the Immigration and Naturalization Service is a defendant.

13. Paragraph 13 of the Complaint represents material that is impertinent or scandalous and, as such, requires no response. To the extent that a response may be required, paragraph 13 is denied.

14. Deny paragraph 14 of the Complaint, except admit that at preliminary interviews statements are taken from aliens seeking entry into the United States pursuant to 8 U.S.C. § 1225 and affirmatively allege that unadmitted aliens have no right to counsel at such interviews.

15. Paragraph 15 of the Complaint requires no response.

16. Deny the first sentence of paragraph 16 of the Complaint and affirmatively allege that the discretion to grant parole under 8 U.S.C. § 1182(d) (5) and 8 C.F.R. § 212.5(d) was exercised in light of such factors as the injunction issued by the lower court in *Sannon v. United States* precluding the holding of exclusion hearings for Haitians. Deny the second sentence of paragraph 16 of the Complaint and affirmatively allege that, following the dissolution of the lower court's injunction in *Sannon*, INS resumed exclusion hearings for Haitians and, in the exercise of discretion, INS initially decided, on or about January 30, 1981 to proceed with exclusion hearings for Haitians based upon the order of their attempt to enter the United States.

17. Deny paragraph 17 of the Complaint and affirmatively allege that unadmitted aliens including Haitians have been held in detention pursuant to 8 U.S.C. § 1225 (b) and that the discretion to grant parole under 8 U.S.C. § 1182(d) (5) and 8 C.F.R. § 212.5(d) has been exercised in light of such factors as the dissolution of the injunction in *Sannon*.

18. Deny paragraph 18 of the Complaint.

19. Deny paragraph 19 of the Complaint and affirmatively allege that on or about April 30, 1981 INS, in the exercise of discretion, decided to proceed with exclusion hearings for the Haitians most recently attempting to enter the United States.

20. Deny paragraph 20 of the Complaint, and affirmatively allege that the lawful exercise of discretion by INS does not require prior resort to the procedures in 5 U.S.C. § 553.

21. Paragraph 21 requires no response.

22. Paragraphs 22, 23 and 24 of the Complaint require no response in view of the deletion of allegations with respect to petitioners made in the Supplemental Pleading and Second Amended Complaint for Declaratory, Injunctive, and Mandatory Relief-Class Action ("Supplemental Pleading") ¶ 2.

23. Paragraph 25 of the Complaint requires no response.

24. Paragraphs 26 and 27 of the Complaint require no response in view of the deletion of allegations with respect to petitioners made in the Supplemental Pleading ¶ 2.

25. Deny paragraph 28 upon information and belief.

26. Deny paragraph 29 and refer plaintiffs to defendants' Notice of Filing dated August 11, 1981. ("Notice of Filing")

27. Deny paragraph 20 of the Complaint, except admit that exclusion hearings are being held at Krome North.

28. Paragraphs 31 and 32 of the Complaint state conclusions of law and, as such, require no response. To the extent that a response may be required, paragraphs 31 and 32 are denied.

29. Paragraph 33 of the Complaint requires no response in view of the deletion of allegations with respect to petitioners made in the Supplemental Pleading ¶ 2.

30. Deny knowledge or information sufficient to form a belief as to the truth or falsity of paragraph 34 of the Complaint and refer plaintiffs to the Notice of Filing.

31. Paragraph 35 of the Complaint requires no response.

32. Paragraphs 36 and 37 of the Complaint require no response in view of the deletion of allegations with respect to petitioners made in the Supplemental Pleading ¶ 2.

33. Deny paragraph 38 of the Complaint and refer plaintiffs to the Notice of Filing.

34. Paragraph 39 of the Complaint requires no response.

35. Deny paragraph 40 of the Complaint except deny knowledge or information sufficient to form a belief as to the truth or falsity of the first and second sentences of paragraph 40 of the Complaint.

36. Deny paragraph 41 of the Complaint and affirmatively allege that none of the cited provisions requires INS to inform unadmitted aliens that they may obtain entry into the United States by filing a claim for political asylum.

37. Paragraph 42 of the Complaint requires no response.

38. Deny paragraphs 43 through 56 of the Complaint.

39. Except to the extent not otherwise admitted, all allegations in the Complaint are denied.

FIRST AFFIRMATIVE DEFENSE

40. The Court lacks jurisdiction over the subject matter of this action.

SECOND AFFIRMATIVE DEFENSE

41. The Complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

42. Plaintiffs have failed to exhaust administrative remedies and the issues raised in the Complaint are not ripe for adjudication.

FOURTH AFFIRMATIVE DEFENSE

43. The issues raised in the Complaint raise political questions and are not justiciable.

FIFTH AFFIRMATIVE DEFENSE

44. Plaintiffs' claims raise issues that are committed to agency discretion by law and for which applicable statutes preclude judicial review.

SIXTH AFFIRMATIVE DEFENSE

45. Plaintiffs claims are barred by the separation of powers.

SEVENTH AFFIRMATIVE DEFENSE

46. Plaintiffs lack standing to bring this action.

EIGHTH AFFIRMATIVE DEFENSE

47. Venue in the Southern District of Florida is improper for claims with respect to alien plaintiffs detained outside this district.

NINTH AFFIRMATIVE DEFENSE

48. Plaintiffs' Complaint fails to comply with Rules 8 and 11 of the Federal Rules of Civil Procedure and contains allegations that are irrelevant, immaterial, impertinent and scandalous.

WHEREFORE, defendants demand judgment dismissing plaintiffs' complaint with prejudice, awarding defendants their costs and disbursements, including attorneys' fees, and granting defendants such other relief as this Court may deem just and proper.

DATED: Miami, Florida
December 31, 1981

ATLEE W. WAMPLER, III
United States Attorney
for the Southern District
of Florida
Attorney for Defendants

By: /s/ Thomas E. Moseley
THOMAS E. MOSELEY
Assistant U.S. Attorney
155 South Miami Avenue
Miami, Florida 33130
Tel: 350-5957

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
S. D. Florida
MIAMI DIVISION

No. 81-1260-CIV-EPS

LUCIEN LOUIS, JEAN LOUIS, SERVEBIEN, PIERRE SILIEN, SERGE VERDIEU, MILFORT VILGARD and JOEL CASIMIR, on behalf of themselves and all others similarly situated; and the HAITIAN REFUGEE CENTER, INC., a nonprofit membership corporation, on behalf of itself and its members, PLAINTIFFS

v.

DORIS MEISSNER, Acting Commissioner, Immigration and Naturalization Service; JOE HOWERTON, District Director, Immigration and Naturalization Service, District VI; LEE ROWLAND, Assistant District Director for Deportation, Immigration and Naturalization Service, District VI; FRED ALEXANDER, Officer in Charge, Krome Avenue North Detention Facility; THE IMMIGRATION AND NATURALIZATION SERVICE; WILLIAM FRENCH SMITH, Attorney General of the United States, DEFENDANTS

Feb. 24, 1982

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS IN PART

SPELLMAN, District Judge.

THIS CAUSE came before the Court on Defendants' Motion to Dismiss. Having reviewed the record in this cause and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is GRANTED in part as follows:

PROCEDURAL BACKGROUND

Originally this case was instituted on June 30, 1981 as a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2241.[1] The Petitioners named therein were "Marie Lucie Jean and Harold Jacques, on behalf of themselves and other Haitian aliens similarly situated, and the Haitian Refugee Center, Inc." The Petition was filed in order to "stay final orders of exclusion and deportation against certain Haitian refugees issued by the Immigration and Naturalization Service" (hereinafter INS). These "final orders" were allegedly obtained in violation of Petitioners' rights to "a fair exclusionary hearing and to fair proceedings, and to consult with counsel."

On June 16, 1981 an amended petition for a writ of habeas corpus and a complaint for declaratory, injunctive and mandatory class action relief were filed.[2] Seven causes of action were asserted therein: (1) that the Defendant officials of INS District VI and their employees conducted preliminary interviews with Petitioners

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[1] This cause was originally assigned to Judge Hastings and was not transferred to this Division until December 3, 1981.

A review of the original Petition reveals that it was defective on its face and should have been dismissed for failure to comply with the provisions of 8 U.S.C. § 1105a(b).

[2] On June 12, 1981, during a hearing before Judge Hastings, Petitioners announced their intent to file an amended Petition to include all Haitians in exclusion proceedings. On June 16, 1981, an amended Petition for a Writ of Habeas Corpus was filed, along with the original complaint for declaratory, injunctive and mandatory relief-class action.

The Court formally sanctioned the filing of the amended petition and complaint when it denied Defendants' motion to have parties dropped and claims severed in the complaint. *See Order*, dated July 6, 1981, docket no. 26.

and Plaintiffs in which the refugees were compelled to appear in person before INS representatives without being permitted to be accompanied, represented, and advised by counsel, and without being advised of their right to do so, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 555(b); (2) that on or about May 20, 1981, Defendants changed their prior policy with respect to the parole and detention of Haitian refugees arriving after that date, the order in which such refugees would be subjected to exclusion proceedings, and the manner in which such proceedings would be conducted, a change in policy which is unlawful since not accomplished in accordance with the rulemaking requirements of the APA, 5 U.S.C. § 553; (3) that Defendants failed to provide Petitioners with adequate notice of their right to counsel at exclusion hearings and of their right to a hearing on which they would have a reasonable opportunity to present evidence, to examine and object to evidence, and to cross-examine witnesses against them, failed to give Petitioners written notice of the purposes for their detention and hearing, and on information and belief, threaten not to provide such notice to plaintiffs when and as they are subjected to exclusion proceedings, all in violation of INS Operations Instructions, 8 C.F.R. § 235.6 (a) (1981), Section 292 of the Immigration and Nationality Act, 8 U.S.C. § 1362, the Due Process Clause of the Fifth Amendment, and the United Nations Convention and Protocol Relating to the Status of Refugees ("Protocol"); (4) that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, access to counsel in connection with their exclusion proceedings, in violation of INS Operations Instructions and Regulations, 8 C.F.R. § 236.2(b) (1981), Section 292, of the Immigration and Nationality Act, 8 U.S.C. § 1362, the Due Process Clause of the Fifth Amendment, the First Amendment, and the Protocol, and in violation of Plaintiff HAITIAN REFUGEE CENTER, INC.'s rights under the First Amendment; (5) that Defendants denied

Petitioners, and on information and belief threaten to deny Plaintiffs, their right to a public exclusion hearing, in violation of INS Operations Instructions and Regulations, 8 C.F.R. § 236.2(a) (1981), the Due Process Clause of the Fifth Amendment and the Protocol, or in the alternative, that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, their right to a private hearing under said regulation; (6) that Defendants denied Petitioners, and on information and belief threaten to deny Plaintiffs, their right to apply for political asylum in violation of INS Operations Instructions and Regulations, 8 C.F.R. § 236.2(a) (1981), Section 208 of the Immigration Act, 8 U.S.C. § 1158, and the Protocol, and denied Petitioners and on information and belief threaten to deny Plaintiffs their right to notice of their right to seek political asylum in violation of the Protocol, the Due Process Clause of the Fifth Amendment, 8 C.F.R. § 208.1 *et seq.*, 8 C.F.R. § 236.3, Section 208 of the Immigration Act, 8 U.S.C. § 1158, INS Operations Instructions, and (7) that Defendants have applied a double standard regarding the exclusion of aliens, subjecting Haitian refugees but no other refugee groups to the above policies and procedures, resulting in discrimination and threatened discrimination based on race and national origin in violation of the Equal Protection requirements of the Due Process Clause of the Fifth Amendment and the Protocol.

An Amended Complaint was filed on August 24, 1981. In addition to deleting two parties named in the First Amended Petition/Complaint, and adding six new Plaintiffs, it was alleged that: "On or about August 10, 1981, this Court granted defendants' Motion to Vacate petitioners' final orders of exclusion and to remand to the Immigration and Naturalization Service.[3] As a result, the class designated as 'petitioners' in the Complaint, and defined as refugees for whom final orders of exclusion

[3] *See Order*, dated August 10, 1981, *nunc pro tunc* to July 10, 1981, docket no. 38.

and deportation have been issued is non-existent and has been absorbed into the class designated as 'plaintiffs' in the complaint, and defined as refugees who have not yet been issued final orders of exclusion and deportation: As a result allegations in the Complaint concerning petitioners should not refer exclusively to plaintiffs." [4]

On September 30, 1981, the Court granted Plaintiffs' motions for class certification and for a preliminary injunction.[5] The class of Plaintiffs before the Court is defined as follows:

> The Class consists of all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either: (1) unrepresented by counsel; or (2) represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.[6]

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[4] On February 1, 1982, the Court orally ordered Plaintiffs to file an amended complaint within ten days in order to resolve certain ambiguities that were created when the first amendment to the complaint was filed on August 24, 1981. As of February 18, 1982, the second amended complaint has not been filed as ordered. Therefore, the Court is ruling on the motion to dismiss based on the allegation contained in the original complaint filed June 16, 1981, docket no. 6, and the amendment thereto, filed August 24, 1981, docket no. 50.

[5] The Class was certified and the injunction issued prior to the transfer of this cause to the undersigned judge.

[6] The orders certifying the class and enjoining the Defendants from holding exclusion hearings were modified by this Court based on legal and factual developments that occurred subsequent to the entry of said orders. In particular, at the time of the transfer, there were motions pending for the decertification and clarification of the class certified by Judge Hastings. In addition, subsequent to the transfer, the Dade County Bar Association has made a

The injunction permits the Defendants to proceed with exclusion hearings for those class members delineated in "(2)" of the definition but it prohibits entry of a final, non-appealable order of exclusion against them without prior notice being given to the Court. As to all other class members, the Defendants are enjoined from holding any exclusion proceedings until their claims are resolved.

SECTION 106 OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1105a PRECLUDES JUDICIAL REVIEW OF COUNTS I, III, V AND VI IN THEIR ENTIRETY AND COUNTS IV AND VII IN PART

United States District Courts are tribunals of limited jurisdiction; their power to hear a case is dependent upon

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significant and historic effort to obtain attorneys to represent indigent Haitian nationals, many of whom have been incarcerated at the Krome Detention Facility for over six months. In a matter of weeks, the Dade County Bar Association has been successful in obtaining over three hundred lawyers to represent the indigent Haitians so that their hearings may proceed and they may obtain some form of resolution of their asylum claims to remain in the United States.

The class in this case, prior to the modification order, was defined as only Haitians who were unrepresented. To leave the class in that status would have placed the Haitians in detention in the situation of choosing between having counsel or having the protection of this Court's injunction, and any relief that may ultimately be obtained from this lawsuit. Therefore, the Court modified the class to include Haitians represented through the Dade County Bar's project and, should similar projects be initiated in other areas where class members are detained, similar modifications would, in all likelihood, be forthcoming.

Simultaneously with the class modification, the Court modified the injunction to allow class members represented by counsel provided through the Dade County Bar's project to begin their exclusion hearings. However, the Court required the Defendants to provide notice to the Court prior to the entry of a final, nonappealable order of exclusion. *See Order Denying Decertification and Granting Modification of the Class and Preliminary Injunction*, dated February 9, 1982, docket no. 288.

congressional implementation of one of the Constitution's grants of subject matter jurisdiction. As a result, it is imperative that the applicable statutory requirements relating to subject matter jurisdiction be satisfied before the Court proceeds to adjudicate the controversy.

The relevant statutory authority in the case at bar is Section 106 of the Immigration and Nationality Act, (hereinafter INA), 8 U.S.C. § 1105a. That section provides in part:

> (b) *Notwithstanding the provisions of any other law,* any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings *and not otherwise.*
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order. (Emphasis added)

Defendants' motion to dismiss concentrates its challenge on this Court's power to hear the claims delineated

in the complaint. In the absence of a final order of exclusion, and exhaustion of administrative remedies, Defendants contend that the Court is divested of subject matter jurisdiction.[7] On the other hand, Plaintiffs believe that the Court has jurisdiction regardless of the fact that final orders of exclusion have not been entered against them and they have not exhausted their administrative remedies. The essence of their argument is as follows:

> The terms of the statute, its legislative history and the cases defendants cite demonstrate that Congress in 8 U.S.C. § 1105a(b) only intended to limit the method of review to habeas corpus for *final* orders *after* they had been made or to determinations made *during* or *incident to* exclusion proceedings, not the separate or preliminary matters which comprise the essence of the claims asserted by Plaintiffs.

Plaintiffs' Memorandum in Opposition to the Motion to Dismiss, filed October 30, 1981, docket no. 146, at 24.

The resolution of these conflicting interpretations of Section 1105a must begin with the language of the statute itself. *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980); *Ernst & Ernst v. Hochfedler*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979); *Watt v. Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981). The statute provides that habeas corpus is the sole and exclusive procedure for the judicial review of final orders of exclusion. However, it does not explicitly preclude judicial review of procedures utilized in exclusion proceedings prior to the entry of a final or-

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[7] Defendants' motion to dismiss does not assert that Section 1105a(b) bars the claim set forth in Count II. Rather, they base their jurisdictional challenge to that Count on the "political question" doctrine. *See Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The Court declines to rule on that question at this time.

der. In this respect, the provisions of Section 1105a(b) are ambiguous and unclear.

The cardinal principle of statutory construction is to give effect to the intent of Congress. *Watt v. Alaska, supra; Sinclair Refining v. Atkinson*, 370 U.S. 195, 215, 82 S.Ct. 1328, 1339, 8 L.Ed.2d 440 (1962); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980). When the intent of Congress is not clear from the language of the statute itself and the Court is faced with two possible interpretations of the statute, it is appropriate to rely on the legislative history to ascertain that intent. *Rogers v. Frito-Lay, Inc., supra; United States v. Noe*, 634 F.2d 860 (5th Cir. 1981); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976). A brief examination of the background to 8 U.S.C. § 1105a(b) indicates that Congress did not intend what Plaintiffs urge this Court to believe.

Until 1955, deportation and exclusion orders could only be reviewed by a writ of habeas corpus. Thus, in order to obtain judicial review of a deportation order, the alien had to be in custody. In 1955, the Supreme Court held that the judicial review provisions of the APA permitted an alien to obtain judicial review of a deportation order by an action for declaratory judgment. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955). The following year the Supreme Court held that an alien could also secure judicial review of an exclusion order by resort to the APA. *Brownell v. We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225 (1956).

In response to these developments, Congress, in 1961, enacted 8 U.S.C. § 1105a in order to overrule the *Shung* case and to prevent the abuses of the judicial system by which an alien could challenge his exclusion or deportation in successive lawsuits. H.Rep.No.1086, 87th Cong. 1st Sess., *reprinted in* [1961] 2 U.S.Code Cong. & Ad. News 2950, 2969, 2974. Section 1105a was intended to be the "single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of

aliens from the United States . . ." *Id.* at 2966. It was enacted because "habeas corpus is a far more expeditious judicial remedy than that of declaratory judgment" and because "[t]here is no validity or sound legal basis for any procedure which permits an excluded alien to extend his presence in the United States for 7 years while his eligibility to enter this country is being disputed in the courts." (as occured in *Shung*). *Id.* at 2977.

Congress' intent in enacting Section 1105a was to end the seemingly endless procedural delays that allowed an excludable or deportable alien to prolong his departure from this country. *Foti v. Immigration and Naturalization Service*, 375 U.S. 217, 226, 84 S.Ct. 306, 312, 11 L.Ed.2d 281 (1963). The means to effect the purpose of the statute was to codify the sole and exclusive procedure for challenging the exclusion and deportation process. *Cheng Fan Kwok v. Immigration and Naturalization Service*, 392 U.S. 206, 214, 88 S.Ct. 1970, 1975, 20 L.Ed.2d 1037 (1967).

It is inconceivable to believe that Congress would legislate against the delays that can follow the entry of a final order of exclusion without intending to cut off similar dilatory practices that might be utilized prior to the entry of an order. If such an interpretation is not abundantly clear, as this Court believes it is, from the language and statutory history of the statute, it becomes so when one analyzes the policy reasons for the statute's jurisdictional requirements. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966); *United States v. American Trucking Associations*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed 1345 (1940); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975); *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980).

A basic principle of law, codified by the statute, is that courts will review only final orders. Interlocutory orders cannot and should not be reviewed because such a procedure would encourage procedural attacks which would

confuse the administrative proceedings and substantially increase the burdens on this Court.

The requirement of finality is closely linked to the doctrine that administrative remedies must be exhausted, and it serves the same purpose.

> A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals. Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise. * * * [J]udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that the frequent and deliberate flouting of administrative process could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

McKart v. United States, 395 U.S. 185, 194-5, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408 (1938).

The statute's "finality" and "exhaustion" requirements are consistent with this Court's conclusion that Congress intended Section 1105a to restrict, not expand, judicial relief for aliens. See *See Cheng Fan Kwok v. Immigration and Naturalization Service*, 392 U.S. 206, 88 S.Ct. 1970, 20 L.Ed.2d 1037 (1967); *Cobb v. Murrell*, 386 F.2d 947, 951 (5th Cir. 1967); *Marcello v. Dist. Dir. of Immigration*, 634 F.2d 964, 965 (5th Cir. 1981). Interpreting the statute to allow Plaintiffs to challenge "separate or preliminary matters" without complying with the statute's requirements would be antithetical to Congress' intent when enacting Section 1105a. Such an interpretation is impermissible when, as here, Congress' intent is clear. *Sinclair Refining Co. v. Atkinson, supra; United States v. Second Nat'l. Bank of North Miami*, 502 F.2d 535 (5th Cir. 1974) *cert. denied*, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1974); *Saxon v. Georgia Ass'n. of*

Independent Insurance Agents, Inc., 399 F.2d 1010 (5th Cir. 1968).

Therefore, the Court holds that Plaintiffs may only seek judicial review of the policies and procedures that are used during and incident to their exclusion proceedings by habeas corpus and only after meeting the jurisdiction requirements of Section 1105a.[8]

TOTAL DISMISSAL NOT WARRANTED

This conclusion does not mandate dismissal of the entire complaint. The Court is of the view that it is without subject matter jurisdiction to hear only those portions of Counts I and III through VII that would "merge" into a final order of exclusion. "Merge" refers to any practice, policy or procedure that is used during or incident to the exclusion proceeding which is reviewable on appeal to the Board of Immigration Appeals (hereinafter "BIA") or which may be reviewed in habeas corpus proceedings in the district court. *See* 8 U.S.C. § 1226(b); 8 C.F.R. §§ 3.1, 236.7; C. Gordon & H. Rosenfeld, Immigration Law and Procedure § 1.10; *Foti v. Immigration and Naturalization Service, supra*, 375 U.S. at 229, 84 S.Ct. at 314; *Cheng Fan Kwok v. Immigration and Naturalization Service, supra*, 392 U.S. at 211, 216, 88 S.Ct. at 1973, 1976; *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980).[9] The

[8] There are no allegations in the complaint that the remedies provided by the statute and regulations are inadequate or ineffective. *See, e.g., NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968); *Walker v. Southern Railway*, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294 (1966), and the Court does not find this to be a case that falls into one of the exceptions to the exhaustion doctrine. *See Patsy v. Florida International University*, 634 F.2d 900 (5th Cir. 1981) (en banc). This is true especially in light of the absence of any final orders.

[9] All of the Counts hereafter dismissed challenge procedures or practices that would be encompassed by a final order of exclusion. *See Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442, 458 (S.D. Fla. 1980). The allegations of said Counts do not seek review of discretionary relief collateral to exclusion proceedings as permitted by *Foti* and *Cheng, supra*. The Court has retained jurisdiction over those portions of the complaint that seek review of discretionary acts.

Court finds that the following Counts, or portions thereof, would merge into any final order of exclusion that may be entered and that the Court is without subject matter jurisdiction to hear them at this time:

1. As alleged, Count I is DISMISSED in its entirety. *If* an alien has a *right* to be represented by counsel during an interview with an INS representative, and *if* a statement is taken from him in derogation of that right, which is used in subsequent proceedings and results in the entry of a final order of exclusion, that practice or procedure is reviewable on appeal to the BIA and in habeas proceedings.[10]

2. As alleged, Count III is DISMISSED in its entirety. To the extent that any alleged failure to give an alien notice of the nature of his exclusion hearing results in the entry of a final order of exclusion, that failure is reviewable on appeal to the BIA and in habeas proceedings.

3. As alleged, Count IV is DISMISSED in part. To the extent that Count IV asserts a claim that the Haitians in detention have a right of access to persons who are not in detention (counsel or otherwise), that claim is DISMISSED. It is the view of the Court that if such a denial of access in fact takes place and results in harm to the alien in the form of entry of a final order of exclu-

[10] The Court intimates no views on whether such interviews constitute primary or deferred inspection or whether they fall within the provisions of 8 C.F.R. § 252.5(b). To the extent that information obtained in said interviews is used to impeach the alien, *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980) and *United States v. Rada-Solano*, 625 F.2d 577 (5th Cir. 1980), suggest that they are admissible even if illegally obtained.

sion, that practice can be reviewed on appeal to the BIA and in habeas proceedings.

4. As alleged, Count V is DISMISSED in its entirety. These procedures are reviewable after entry of a final order of exclusion by appeal to the BIA and in habeas proceedings. Moreover, the Defendants have agreed to cease using mass hearings and have further agreed to give each individual alien, presently in the class defined by the Court, an exclusion hearing and the choice of having a private or public hearing. Thus, Count V is MOOT.

5. As alleged, Count VI is DISMISSED in its entirety. If and when the alleged failure to give an alien notice of his alleged right to claim political asylum results in the entry of a final order of exclusion, that procedure may be challenged in an appeal to the BIA and/or in habeas corpus proceedings.

6. As alleged, Count VII is DISMISSED in part. To the extent that Count VII alleges that the challenged policies and procedures heretofore dismissed are being applied in a discriminatory fashion, Count VII is DISMISSED. If the alleged discrimination results in a final order of exclusion, that discrimination can be challenged on appeal to the BIA and/or in habeas corpus proceedings.

The Court retains jurisdiction over the following claims:

1. Count II in its entirety.

2. Count IV insofar as it alleges that Haitians in detention have First Amendment rights that require them to be given access to persons not in detention (counsel or otherwise). The Court will also hear HRC, Inc.'s claim of a right to access to persons in detention.

3. Count VII only insofar as it alleges that the detention "policy" is currently being applied in a discriminatory fashion against Plaintiffs.

PLAINTIFFS LACK STANDING TO CHALLENGE THE PROCEDURES USED IN EXCLUSION HEARINGS

A more fundamental bar to this Court's exercise of jurisdiction over the Counts herefore dismissed is Article III of the Constitution.

> [T]he judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.
>
> Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.

Flast v. Cohen, 392 U.S. 83, 94-5, 88 S.Ct. 1942, 1949-50, 20 L.Ed.2d 947 (1968).

Standing requires "at an irreducible minimum . . . the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 [99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66] (1979), and that the injury 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 [96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976)." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, —— U.S. ——, ——, 102 S.Ct. 752, 758, 70 L.Ed. 2d —— (1982). The allegations of the complaint before the Court fail to meet very element of this test.

The complaint fails to establish that any causal relationship exists between the putatively illegal conduct of the Defendants and the injury Plaintiffs allege they are threatened with.[11] There has been no showing that the policies and procedures complained of will continue to be used,[12] that use of these procedures will result in the entry of final orders of exclusion, or that the administrative process will not cure the alleged defects.[13] *Hernandez*

[11] Such a relationship could easily be established, if it exists, during the administrative proceedings thereby providing this Court with an adequate record on which to render a decision.

[12] It is questionable which of the challenged practices and procedures are still being used or would be used if the injunction were lifted. The fact that this Court must engage in such speculation supports its view that Plaintiffs' claims are not justiciable at this time.

[13] It is for these reasons that the Court, in its order modifying the class, found "commonality" among class members only with regard to the detention issues. Clearly there can be no common questions of law and fact where the individual Plaintiffs will be exposed to different practices and procedures during their exclusion hearings. This is true for the typicality requirement as well. The only claims where the named Plaintiffs have presented issues of law

v. Immigration and Naturalization Service, 539 F.2d 384 (5th Cir. 1976). More significantly, Plaintiffs have not alleged that a favorable decision on the merits is likely to redress their injury. Even if this Court were to grant all the relief Plaintiffs seek, they would still be subject to exclusion proceedings and possibly deportation.

Unless and until the challenged practices result in the entry of final orders of exclusion against Plaintiffs, this Court finds as a matter of law that they suffered no injury in fact.[14] To the extent that the complaint alleges "on information and belief" the allegedly illegal procedures will be used in processing Haitian aliens, there is a claim of threatened injury, but this allegation alone will not meet the test of standing. Apart from the minimal constitutional requirement of injury, the Supreme Court has recognized other limits on the class of persons who may invoke the Court's decisional and remedial powers. *See Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (assertion of a generalized grievance shared in substantially equal measure by all or a large class of citizens does not normally warrant exercise of jurisdiction);

or fact common or typical to the class are in connection with their continued detention.

[14] Injury is not the use of an allegedly illegal practice procedure but the adverse consequence thereof. Thus, Plaintiffs have a perfect right to object to any practice or policy they find to be objectionable but they are not entitled to review of that practice unless and until they are injured by it, to wit, it results in the entry of a final order of exclusion.

Were this Court to proceed based on the allegations of threatened injury it would have to speculate as to whether and how the alleged unlawful practices would be utilized against the Plaintiffs. The Court believes that it is best not to engage in speculation of this nature and that the need to do so indicates the absence of a ripe controversy. *See Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1971); *O'Shea v. Littleton*, 418 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974).

Tileston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943); *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953) (Plaintiffs must generally assert their own rights and interest, and cannot rest their claim to relief on the legal rights or interests of third parties).[15] One such limit requires that the injury be to a "legal right" of the Plaintiff. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1929); *Linda R. S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the Plaintiffs' position a right to judicial relief. *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1974).

Under the Constitution, there is no question that aliens who seek to enter the United States "may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by its sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall proscribe." *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). It matters not

[15] In this regard, the Court has serious questions about Plaintiff HRC's standing to assert the claims of its "members" while asserting claims of its own. HRC is neither a traditional voluntary association nor the kind of entity allowed associational standing in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Instead, HRC purports to make Haitians members of its organization by its definition, without any voluntary act or choice on their part. Moreover, the Court has found, infra, that its members have no standing to sue in their own right and, therefore, one of the prerequisites to organizational standing has not been met. *Id.* at 343, 97 S.Ct. at 2441.

whether the alien is outside the borders of the United States, as in *Kleindienst v. Mandel*, 408 U.S. 753, 762, 92 S.Ct. 2576, 2581, 33 L.Ed.2d 683 (1972); or is in detention as an excludable alien as in *Shaughnessy v. Mezei*, 345 U.S. 206, 210-215, 73 S.Ct. 625, 628-30, 97 L.Ed. 956 (1953); or has been paroled pursuant to 8 U.S.C. § 1182 (d)(5) as in *Leng May Ma v. Barber*, 357 U.S. 185, 188-189, 78 S.Ct. 1072, 1074-75, 2 L.Ed.2d 1246 (1958); *Kaplan v. Tod*, 267 U.S. 228, 45 S.Ct. 257, 69 L.Ed. 585 (1925); he is deemed to be unadmitted and has "[n]o constitutional right to entry to this country as a nonimmigrant or otherwise." *Kleindienst v. Mandel*, *supra*, 408 U.S. at 762, 92 S.Ct. at 2581.

In the absence of constitutional right of entry, the threatened injury to Plaintiffs must exist by virtue of "statutes creating legal rights, the invasion of which creates standing . . ." *See Linda R. S. v. Richard D.*, *supra*, 410 U.S. at 617 n.3, 93 S.Ct. at 1148 n.3; *Sierra Club v. Morton*, *supra*, 405 U.S. at 732, 92 S.Ct. at 1364. The Immigration and Nationality Act does not give the Plaintiffs a right to enter this country; rather, it establishes a procedure through which an administrative decision can be made on whether an alien should be admitted. *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977).[16]

Throughout the proceedings in this cause, the Defendants have taken the position that the Act entitles Plaintiffs to an exclusion hearing. Indeed, justice requires that the Plaintiffs, having been held in detention for months awaiting exclusion proceedings, be given the opportunity to be heard.[17] But that does not mean that the statute

[16] "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff v. Shaughnessy*, 338 U.S. 537, 544, 70 S.Ct. 309, 313, 94 L.Ed. 317 (1950).

[17] Most, if not all, of the aliens before this Court did not arrive at ports of entry of the United States. *See* 8 C.F.R. §§ 100, 235.1 (a). They arrived on any beach where the currents take them, or

confers standing on these Plaintiffs to challenge the manner in which INS interprets and applies the statute to them particularly when they have not been injured thereby.

Based on the reasons set forth above, the Court finds that the Plaintiffs lack standing to assert the claims heretofore dismissed. This conclusion serves to reinforce the Court's prior ruling that judicial review is available only after the entry of a final order of exclusion and exhaustion of administrative remedies. It is questionable whether any alien that has not been subject to the exclusion procedure would have standing to challenge procedures that "on information and belief" were going to be used against him.[18] Just as Congress cannot, by an affirmative act, expand this Court's jurisdiction beyond that provided for in Article III, *Barlow v. Collins*, 397 U.S. 159, 173, 90 S.Ct. 832, 841, 25 L.Ed.2d 192 (1969), an omission or ambiguity in a statute cannot be construed to allow the adjudication of a nonjusticiable controversy. The procedures set forth in Section 1105a is the sole and

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where apprehended prior to reaching these shores. There has been no colorable attempt to comply with the immigration laws; rather, the Haitians have attempted to thwart the orderly procedures for entry by arriving in masses, with no way to return to their homeland, and thereafter by uniformly making claims of persecution in their homeland which are difficult, if not impossible, to verify. Under such circumstances there is a serious question, to be decided another day, as to whether the INS would have a right to exclude and deport such aliens without a hearing.

[18] If a literal construction of the words of a statute would lead to an absurd result, the statute must be construed so as to avoid that result. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892); *United States v. Mendoza*, 565 F.2d 1285, 1288 (5th Cir. 1978). The Court feels that it would be absurd to read Section 1105a(b) as allowing Plaintiffs to challenge the procedures they believe INS will use during their exclusion hearings before being subject to such hearings and without suffering any injury in fact. The construction the Court has given to that Section will avoid such a result.

exclusive means for review of the issues before this Court and until its prerequisites are complied with, this Court is without jurisdiction to hear Plaintiffs' claims.[19]

CONCLUSION

In spite of the Court's lack of jurisdiction over many of the claims delineated in the complaint, it appears that much of the relief sought therein will be forthcoming. This conclusion is based on Defendants' unequivocal representations to the Court that, with regard to this particular class, individual exclusion hearings will be afforded regardless of the Court's ruling on the merits. In order to insure that these representations are complied with, the Court directs the Defendants to file, within sixty (60) days from the date of this Order, a detailed plan setting forth the method and means that will be utilized for conducting individual exclusion hearings with regard to all class members.[20] Because the Court antici-

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[19] Plaintiffs' inability to establish an independent basis for this Court to hear the claims heretofore dismissed and the Court's finding that they lack standing with regard to those claims, precludes the Court from granting mandamus relief pursuant to 28 U.S.C. § 1361. *Starbuck v. City and County of San Francisco*, 556 F.2d 450 (9th Cir. 1970). Plaintiffs' failure to exhaust their administrative remedies also bars mandamus relief. *See Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972); *Lane v. Hanberry*, 593 F.2d 648 (5th Cir. 1979).

Similarly, 28 U.S.C. §§ 2201, 2202 do not provide this Court with an independent jurisdictional basis for deciding the dismissed claims. *See Seibert v. Baptist*, 594 F.2d 423, 428 n.17 (5th Cir. 1979) (citing *Red Lobster Inns of America, Inc. v. New England Oyster House, Inc.*, 524 F.2d 968, 969 (5th Cir. 1975); *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 666 (5th Cir. 1967).

The Court reserves ruling on Defendants' Motion to Dismiss or Transfer for Improper Venue.

[20] The Court's supervision of this plan should be construed to mean that it affords the aliens who participate therein all of the rights to which they are entitled under the Immigration laws and regulations. Moreover, Plaintiffs are in no way precluded from seeking, if necessary, administrative and judicial review.

pates initiation of pro bono representation projects in all areas where class members are detained similar to that embarked upon by the Dade County Bar Association, the plan submitted shall be structured on the assumption that all class members will be individually represented by counsel. The Court will retain jurisdiction over the class until the plan is operational and its injunction remains in full force and effect until further order of the Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260 Civ EPS

LUCIEN LOUIS, ET AL., PLAINTIFF

vs.

ALAN C. NELSON, ET AL., DEFENDANTS

PRETRIAL STIPULATION

1. THE NATURE OF THE ACTION: This is an action for injunctive and declaratory relief challenging alleged actions of the Immigration and Naturalization Service with respect to Haitian Nationals who are class members.

2. THE BASIS OF FEDERAL JURISDICTION: The asserted bases for jurisdiction are 8 U.S.C. § 1329 and 28 U.S.C. §§ 1331, 1361, 2201 *et seq.*, 28 U.S.C. § 2241.

3. THE PLEADINGS RAISING THE ISSUES:

1. Amended Petition for Writ Habeas Corpus and Complaint for Declaratory Injunction Mandatory Relief.
2. Supplemental Pleading and Second Amended Complaint.
3. Answer.
4. Plaintiffs' Motion for Preliminary Injunction, Defendants' Response and Plaintiffs' reply.

4. UNDISPOSED MOTIONS OR OTHER MATTERS REQUIRING ACTION BY THE COURT:

1. Plaintiffs' Motion for Preliminary Injunction.

2. Plaintiffs' Motion to Retake the Deposition of ALAN NELSON, etc.

3. Plaintiffs' Motion for Civil Contempt, and Renewed Motion for Civil Contempt.

4. Plaintiffs' Motion for Protective Order re contact with witnesses.

5. Plaintiffs' Motion to Strike Defendants' witnesses.

6. Notice to Produce at Trial.

7. Defendants' Motion to Dissolve Preliminary Injunction—Plaintiffs contend that this is not an undisposed motion.

8. Defendants' Motion to Dismiss or Transfer.

5. CONCISE STATEMENT OF STIPULATED FACTS WHICH WILL REQUIRE NO PROOF AT TRIAL: *

1. On November 8, 1977, INS entered into an agreement with the National Council of Churches.

2. From November 8, 1977 to around the Spring of 1981, Haitians who arrived in this country by boat, other than by certified carriers, were subjected to medical screening in detention and when sponsors were available, were released by INS.

3. From November 8, 1977 to around the Spring of 1981, barring Haitians with contagious

* These factual stipulations are made between the parties with the understanding that they will not preclude the offering of evidence with regard to facts not stipulated between the parties so long as the offer of proof does not do violence to the stipulations agreed to.

medical diseases or those whose sponsorship could not be effected or broke down, Haitians were not held in detention pending the outcome of their exclusion hearings by INS.

4. Prior to the Spring of 1981, the INS District Directors were not required to exercise discretion on Parole of Haitians in the categories described in Items 2 and 3, *Supra*, because such Haitians were regularly and routinely released after medical screening and sponsorship. After the Spring of 1981, the practice of regularly releasing those who had been screened medically and for whom sponsors were available ceased. After this time, an administrative decision had to be made before any Haitian could be released on parole. The parties disagree as to whether such administrative discretion by the District Director is exercised for Haitians, or the extent of any such exercise.

5. No publication of a proposed rule concerning detention or parole was published in the Federal Register since at least 1976.

6. If it is proved that Defendants are unlawfully detaining Plaintiffs, Plaintiffs do not need in addition to prove irreparable harm or that the public interest would not be disserved by their release, and Defendants do not and will not contend that they may maintain an unlawful detention on the grounds that the detainee either has suffered no irreparable harm, or that the public interest requires the maintenance of unlawful detention. Defendants do not concede that the appropriate remedy for any finding of unlawful detention would be an order of release.

7. Plaintiff Haitian Refugee Center, Inc., was incorporated as a not for profit corporation in Florida on September 17, 1980.

8. (a) This case has been certified as a class-action consisting of all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently held in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either: (1) unrepresented by counsel; or (2) represented by counsel pro-bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.

(b) The named individual Plaintiffs; and

(c) The Haitian Refugee Center, Inc.

9. The Defendants are as follows:

Those named in the pleadings plus ALAN NELSON, Commissioner of the INS, who is substituted for DORIS MEISSNER and DAVID CROSLAND.

10. On September 29, 1981, President Reagan issued Proclamation Number 4865 and Executive Order Number 12324. The only Coast Guard vessel executing the above-referenced Proclamation and Executive Order is stationed in the Windward Passage.

11. On June 20, 1980, President Carter issued an Executive Order establishing a Cuban/Haitian Entrant Status. On October 10, 1980, the June 20, 1980, the status extended to include all Cubans and Haitians who arrived on or before

that date. On October 22, 1981, the Reagan Administration introduced legislation to establish a "renewable term entrant status" that included all Cubans and Haitians who were present in this country on or before January 1, 1981.

6. CONCISE STATEMENT OF FACTS WHICH, THOUGH NOT ADMITTED, ARE NOT TO BE CONTESTED AT THE TRIAL:

NONE.

7. STATEMENT IN REASONABLE DETAIL OF ISSUES OF FACTS WHICH REMAIN TO BE LITIGATED AT TRIAL: The parties are unable to agree on the issues remaining to be litigated.

A. The Defendants contend that Plaintiffs' claims with respect to detention and parole raise purely legal questions, that review of parole, if proper at all, should be limited solely to the administrative record for an individual alien, and that *de novo* review is improper. With respect to the question of access, the Defendants believe that the following factual issues are presented:

1. The Haitian Refugee Center, Inc., ("HRC"), and its attorneys want to engage in solicitation and communication with detained class members without assuming the responsibility for representing them in exclusion hearings.

2. The INS provides reasonable access to detained aliens consistent with the security of the detention facilities. To the extent that the Court rejects the Defendants' legal argument with respect to detention and parole and holds that there are legal

predicates for Plaintiffs' claims of discrimination, the Defendants submit that the following additional factual issue would be raised:

3. Whether the detention of Haitians pending the determination of their admissibility is based solely upon invidious discrimination.

B. The Plaintiffs' Position:

The Plaintiffs submit that the following factual issues remain for trial:

1. Prior to July 31, 1981, Defendants followed a policy of regularly releasing Haitian nationals.

2. Sometime between the Spring of 1981 and October, of 1981, Defendants changed their policy of regularly releasing Haitians to a policy of detention without parole, with a limited humanitarian exception.

3. The Defendants' detention policy discriminates against Haitians on the basis of national origin and race.

4. The intention of Defendants in establishing and implementing a detention policy was to detain Haitians based on their nationality and race.

5. The detention of Haitians is designed by Defendants to punish Haitians for seeking admittance into the United States and to deter other aliens from effecting entry into the country without prior documentation.

6. The prolonged detention of Plaintiffs is punitive.

7. Detention is an unnecessary restriction on the movements of Plaintiffs.

8. Haitian Class members are or will be seeking asylum in the United States.

9. Plaintiff Class members have exhausted administrative remedies by requesting release on parole, or such requests would be futile.

10. The Haitian Refugee Center, Inc., is a civil liberties organization that uses litigation as a means to advance its political objectives.

11. The Haitian Refugee Center, Inc., does not control the litigation of its attorneys' representation of individual clients in those clients' individual cases. The Haitian Refugee Center, Inc. has sought access and continues to seek access to various INS detention facilities to solicit clients and to communicate with detainees concerning its political and associational purposes.

12. Haitian aliens in detention in Miami, for whom the Haitian Refugee Center, Inc., filed a Notice of Appearance, (G-28), were thereafter transferred to other locations by INS even though INS knew that they were at the time represented by attorneys from the Haitian Refugee Center, Inc. in Miami. In at least some cases, these were punitive transfers designed to punish Haitian aliens for assertion of First Amendments' protected rights. The Class members have been and continue to be denied reasonable access to the Haitian Refugee Center, Inc., and to other organizations and individuals seeking to provide information and legal representation to them.

13. Proposed INS Access Guidelines did not provide reasonable time, place, and manner restrictions on the exercise of First Amendment rights.

8. CONCISE STATEMENT OF ISSUE OF LAW ON WHICH THERE IS AGREEMENT:

1. The INS is an "agency" within the scope of the Administrative Procedure Act, 5 U.S.C. § 551(1).

9. CONCISE STATEMENT OF ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY THE COURT:

A. Defendant's statement of these issues:

1. The Court lacks subject matter jurisdiction over the remaining claims.
2. Plaintiffs lack standing to litigate the remaining claims.
3. The decisions of INS with respect to parole under 8 U.S.C. § 1182(d) are committed to agency discretion by law and judicial review is precluded.
4. Plaintiffs have failed to exhaust administrative remedies with respect to parole.
5. If judicial review is permissible with respect to parole, that review is limited to the administrative record or cannot be on a *de novo* basis.
6. The alleged change of policy with respect to detention and parole represents no more than a commitment to enforce 8 U.S.C. § 1225(b) and 8 U.S.C. § 1182(d)(5); thus, 5 U.S.C. § 553 does not apply to the present situation.
7. The alleged change of policy with respect to parole does not constitute a "rule" within the meaning of 5 U.S.C. § 553(a)(1).
8. The foreign affairs exception in 5 U.S.C. § 553(a)(1) applies in this case.

9. The exception for interpretative rules and general statements of policy in 5 U.S.C. § 553 (b)(3)(A) applies in this case.
10. Plaintiffs have no claim for relief under the Fifth Amendment or the United Nations Convention and Protocol Relating to the Status of Refugees.
11. The political question doctrine and the separation of powers preclude judicial review with respect to detention and parole.
12. If plaintiffs have any legally valid claims with respect to detention and parole, the proper relief is not automatic release.
13. The plaintiffs have no valid claims for relief under the First Amendment.
14. The regulation of access to a detention facility is committed to agency discretion.

B. PLAINTIFF'S STATEMENTS OF THE ISSUES:

1. Whether defendants violated § 552 and § 553 of the APA, 5 U.S.C. §§ 552 and 553 by failing to publish or provide notice or comment in the Federal Register.
2. Whether the violations of APA §§ 552 and 553 requires resumption of the former policy of regularly releasing Haitians pending exclusion proceedings.
3. Under the present circumstances whether they violated the Equal Protection guarantees of the Due Process Clause, of the Fifth Amendment by detaining Haitians in exclusion proceedings.
4. Whether they violated the United Nations Convention and Protocol by: (a) discriminatorily detaining Haitians (Article 3), (b) by using

detention to penalize Haitians who are seeking asylum (Article 31); (c) by unnecessarily restricting the movement of Haitians (Article 31).

5. The extent to which HRC's attorneys have a First Amendment right to solicit class members as clients in detention facilities, and to communicate with detainees concerning its political and associational purposes.

6. Whether the intent to discriminate required of equal protection is applicable to a claim of discrimination under the nondiscriminatory provisions of the Protocol.

7. The extent of the First Amendment rights of class members to receive legal and other information when class members are detained pending immigration proceedings.

10. EACH PARTY'S NUMBERED LIST OF TRIAL EXHIBITS (LIST OF EXHIBITS SHALL BE ON SEPARATE SCHEDULES ATTACHED TO THE STIPULATION)

A. The Plaintiff's list is attached.

11. EACH PARTY'S NUMBERED LIST OF TRIAL WITNESSES (EXPERT WITNESSES SHALL BE SO DESIGNATED):

A. Plaintiffs' list of witnesses is attached.

B. Defendant' list of witnesses is attached.

12. ESTIMATED TRIAL TIME

Plaintiffs' Case: 2 to 5 weeks
Defendant's Case: 1 week

13. WHERE ATTORNEY'S FEES MAY BE AWARDED TO THE PREVAILING PARTY, AN ESTIMATE OF EACH PARTY AS TO THE MAXIMUM AMOUNT PROPERLY ALLOWABLE.

Plaintiff's estimate: Reasonable attorney's fee.

Defendant's estimate: Defendant contends attorneys fees may not be awarded in this case.

DATED: Miami, Florida
February 26, 1982

ATLEE W. WAMPLER, III
UNITED STATES ATTORNEY

By: /s/ Thomas E. Moseley
THOMAS E. MOSELEY
Special Assistant U.S. Attorney
155 South Miami Avenue
Miami, Florida 33130

KURZBAN AND KURZBAN, P.A.
Attorney for Plaintiffs

By: /s/ Ira J. Kurzban
IRA KURZBAN
Suite 901
700 Brickell Avenue
Miami, Florida 33131

UNITED STATES DISTRICT COURT
S. D. FLORIDA

No. 81-1260-CIV-EPS

LUCIEN LOUIS, WILNER LUBERISSE, JEAN LOUIS SERVEBIEN, PIERRE SILIEN, SERGE VERDIEU, MILFORT VILGARD, JOEL CASIMIR, JOB DESSIN and PROPHETE TALLEYVAND, on behalf of themselves and all others similarly situated; and the HAITIAN REFUGEE CENTER, INC., a non-profit membership corporation, on behalf of itself and its members, PLAINTIFFS

v.

ALAN NELSON, Commissioner, Immigration and Naturalization Service, JOE HOWERTON, District Director, Immigration and Naturalization Service, District VI; LEE ROWLAND, Assistant District Director of Deportation, Immigration and Naturalization Service, District VI; CECILIO RUIZ, Officer in Charge, Krome Avenue North Detention Facility; IMMIGRATION AND NATURALIZATION SERVICE; and WILLIAM FRENCH SMITH, Attorney General of the United States, DEFENDANTS

June 18, 1982

Ira J. Kurzban, Kurzban, Kurzban & Weinger, Miami, Fla., Bruce Winick, Univ. of Miami School of Law, Coral Gables, Fla., Irwin P. Stotzky, Vera Weisz, Miami, Fla.; Michael J. Rosen, Miami, Fla.; Robert E. Juceam, Irwin Blum, Terrence A. Corrigan, Anne Golden, Mary B. Gilmore, Robin A. Fleischner, Jeffrey Susskind, New York City, for plaintiffs.

Robert Bombaugh, Dept. of Justice, Civ. Div., Washington, D.C., Thomas E. Moseley, Sp. Asst. U.S. Atty., Miami, Fla., for defendants.

Jim Peters, Dept. of Legal Affairs, Tallahassee, Fla., for State of Fla., intervening defendant.

MEMORANDUM OPINION [1]

SPELLMAN, District Judge.

"Life is like an onion;
you peel off one layer at a time,
and sometimes you weep."

Carl Sandburg

This case has been described by the Government as nothing more than an attack on the proper constitutional effort of the United States to protect its borders from invasion. It has been described by the Plaintiffs as the worse possible case of the Government of the United States engaging in invidious discrimination.

The detention policy giving rise to this lawsuit has been described by some in the news media as a moral disgrace and by others as simply President Reagan's answer to Carter's timidity.

The policy attempted to be formulated and implemented has been both praised and criticized before Congress.

The religious leaders have assailed this matter as a moral issue; the Attorney General of the United States as a political decision.

The letters received by this Court from the outset of receipt of this case in December of 1981 make it clear that to whomever this matter is addressed it is received neither dispassionately, objectively or without some bias having been formed well in advance.

This opinion, the Court fears, will lack the understanding necessary to convey the complexity of the issues formed and the absolute necessity that in recognizing the

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[1] This cause was tried before the Court sitting without a jury. The following Memorandum Opinion shall constitute the Court's Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52.

right of the executive to exercise certain inherent powers, we must never lose sight of the rule of law. It is hoped that in the passioned subjectivity and prejudice of those that read this opinion those that assert detention to be morally wrong must realize that the executive branch of Government must sometimes adopt drastic policies to achieve purposes otherwise unattainable; and to those who would assert the omnipotent power of government to recognize that in adopting such policies they are never above the rule of law, however well intended their actions.

The primary question raised by this action is whether an excludable alien can be incarcerated during the pendency and possible appeal of his claim for admission to this country. This case in a nutshell involves the individual right of freedom versus the right of the United States to enforce the immigration laws of this country.

The sovereign United States government has an absolute right to control its borders. "The right to do so stems not only from legislative power, but is inherent in the executive power to control the foreign affairs of the nation. *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed 255; *Fong Yue Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 1022, 37 L.Ed. 905. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power." *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950).

Congress has passed extensive legislation governing the admission of aliens into this country. The legislation provides the executive with a [relatively] clear indication of Congress' view of immigration policy and a way to carry out their intent.

> The basic premise of the immigration law is that no alien may enter the United States unless his entry is authorized by statute. An alien thus cannot lawfully come across the border of this country unless the law sanctions his entry. Conversely, an alien who complies with the legislative directives has a right to enter if he presents himself at a port of entry.

1 C. Gordon & H. Rosenfeld, Immigration Law and Procedure § 2.1b (footnotes omitted).

The chief and almost exclusive concern of the immigration laws is with aliens who seek to enter the United States from abroad. Congress has imposed three types of restrictions on such aliens: qualitative restrictions bar certain classes of undesirable aliens, principally on health, moral, criminal, political or economic grounds. Numerical limits govern those aliens who come to stay permanently. Documentary restrictions establish identity and assure compliance with other prescribed requirements by commanding entering aliens to obtain and present certain documents, usually in the form of passports or equivalent papers.[2]

Congress has charged the executive branch with the duty to enforce the immigration laws. The Immigration and Naturalization Service (hereinafter INS), a component of the Department of Justice, is the agency that carries out the enforcement function of the executive branch in matters relating to immigration.[3] INS has found the most efficient way to carry out this mandate is by requiring all aliens seeking admission to present themselves to immigration for inspection at designated ports of entry.[4] Upon arriving at immigration, the aliens must establish their admissibility to the satisfaction of the immigration officer in charge.[5] Admissibility is easily established if the alien has in his possession all of the

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[2] *See generally* 2 C. Gordon and H. Rosenfeld, Immigration Law and Procedure § 2.1b.

[3] 8 U.S.C. § 1103.

[4] 8 U.S.C. § 1225; 8 C.F.R. §§ 100.4, 235.1.

[5] 8 U.S.C. § 1225.

documents necessary to enter provided these documents are in good order and not suspect.[6]

Many aliens choose not to follow the prescribed procedures for entering the United States. Some seek to enter surreptitiously at night, by crossing the border in remote, inaccessible areas; others through fraud. Within this class of aliens, motives vary from a simple desire to seek a better life to some individuals who truly seek to escape persecution and repression in their homeland.

If an alien successfully crosses the border surreptitiously, the chances of being apprehended at a later time are slim. INS does not have the resources to make large scale searches for illegal entrants, to proceed against them and possibly expel them. It is much more efficient to use border patrol personnel to apprehend and deter aliens seeking to enter the country unlawfully. INS' efforts in this regard are of marginal effectiveness because this nation's borders are too expansive to be effectively patroled without continuous use of hundreds of thousands of guards.

All of INS' efforts are designed to ferret out aliens who for one reason or another are inadmissible, thereby keeping the number and character of immigrants entering the United States in line with congressional policy. Inadmissible aliens are either deportable or excludable; the former being persons who have effected an "entry", the latter being persons deemed not to have entered the United States.[7] The irony of this distinction is that deportable aliens, many of whom entered the country surreptitiously, are given more rights under the law than

[6] 8 C.F.R. § 235.1.

[7] 8 U.S.C. § 1101(a)(13) defines the term "entry" to mean "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise . . ." *See generally Barber v. Gonzales*, 347 U.S. 637, 641, 74 S.Ct. 822, 824, 98 L.Ed. 1009 (1954) and cases cited therein. *See also* 8 U.S.C. §§ 1226, 1251, 1252.

excludable aliens who present themselves to immigration.[8] The practical effect of this is to encourage those who attempt to sneak across the border because they are rewarded with greater rights than those aliens who attempt to comply with our laws.

Regardless of whether an alien is excludable or deportable, if the alien claims to be admissible INS must determine the merits of the claim.[9] In the case of excludable aliens, Congress has enacted legislation giving them a right to an exclusion hearing.[10] An exclusion hearing is a quasi-judicial proceeding that is held before an immigration judge. While the hearing is not subject to all of the protections of due process, it must be fair and in accordance with the statutes and regulations.[11] If the alien loses at the exclusion hearing, the statute provides that he may seek review of that decision in the Board of

[8] 8 U.S.C. §§ 1226, 1252. *See The Chinese Exclusion Cases*, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905 (1893); *Lem Moon Sing v. United States*, 158 U.S. 538, 15 S.Ct. 967, 39 L.Ed. 1082 (1895); *United States v. Ju Toy*, 198 U.S. 253, 263, 25 S.Ct. 644, 646, 49 L.Ed. 1040 (1905) (The requirements of a judicial trial do not prevail in every case. The decision to deny entrance to an alien may be entrusted to an executive officer and his decision is due process); *accord Knauff v. Shaughnessy*, 338 U.S. 537, 544, 70 S.Ct. 309, 313, 94 L.Ed. 317 (1950) (whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned.) *But see Ng Fung Ho v. White*, 259 U.S. 276, 282, 42 S.Ct. 492, 494, 66 L.Ed. 938 (1922); *Chlomos v. INS*, 516 F.2d 310 (3rd Cir. 1975); *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977); *Garcia-Jaramillo v. INS*, 604 F.2d 1236 (9th Cir. 1979) (In a deportation hearing an alien is entitled to the guarantee of due process which is satisfied only by a full and fair hearing); *Garcia v. Smith*, 674 F.2d 838, 841 n.3 (11th Cir. 1982) citing *Leng May Ma v. Barber*, 357 U.S. 185, 187-188, 78 S.Ct. 1072, 1073-74, 2 L.Ed.2d 1246 (1958).

[9] 8 U.S.C. §§ 1226, 1252.

[10] 8 U.S.C. § 1226.

[11] *Garcia v. Smith*, 674 F.2d 838, 841 n.3 (11th Cir. 1982).

Immigration Appeals (BIA).[12] If this appeal is unsuccessful and a final order of exclusion is entered against the alien, that order may be reviewed by filing a petition for a writ of habeas corpus in the federal district court.[13] The district court's decision can be appealed to the United States Circuit Court of Appeals and ultimately the alien may seek review by certiorari in the United States Supreme Court.[14]

The practical effect of trial and appellate rights for excludable aliens is that if he is apprehended, an alien determined to stay here who retains a skilled immigration lawyer may prolong his departure from this country for years.[15]

A. BACKGROUND

The ineffectiveness of our immigration system is vividly reflected by the present conditions in South Florida. The migration of undocumented Haitians to South Florida began in December 1972. By the beginning of 1981, an

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[12] 8 U.S.C. § 1226(b) provides in part "From a decision of a special inquiry officer an alien may take a timely appeal to the Attorney General and any such alien shall be advised of his right to take such an appeal." The Attorney General has delegated his authority to hear appeals from decisions of special inquiry officers to the BIA. *See* 8 C.F.R. § 3.1(b)(1).

[13] 8 U.S.C. § 1105a(b).

[14] The lengthy administrative and judicial proceedings involved in resolving an alien's claim for admission raises serious questions regarding the validity of detaining aliens, pending resolution of their claims, without some sort of a due process hearing. The argument in favor of a hearing is particularly compelling when the essence of the alien's claim for admission is based on a fear of persecution upon return to his homeland. Thus, the "choice" to voluntarily withdraw an application for admission and thereby be released from detention may not be a meaningful choice. Indeed, the Plaintiffs' failure to elect this alternative indicates that detention in the United States is the lesser of two evils.

[15] *See* 8 U.S.C. § 1255 regarding discretionary relief from deportation.

estimated thirty-five thousand undocumented Haitians were already present in this region. Yet, throughout this time, INS has failed to develop a comprehensive policy to deal with the situation.

During this period of time, INS entered into an agreement with the National Council of Churches providing that Haitians who arrived in South Florida by boat other than a certified carrier were to be detained only a brief period of time for medical screening and were routinely released to available sponsors and given work authorizations.[16] The release of Haitians lasted until the Spring of 1981.[17]

In early April 1980 some 10,000 Cubans sought sanctuary in the Peruvian Embassy in Havana, Cuba. Within a few days thereafter, boats began to leave South Florida for Cuba's Mariel Harbor, in order to bring Cubans to the United States. Thus began the Mariel Boatlift or Freedom Flotilla during which some 125,0000 Cubans were brought to the United States in the Spring of 1980.

The boatlift, and the Government's inability to control it, were natural and foreseeable consequences of this country's lack of a comprehensive immigration policy. Once the "Freedom Flotilla" started, nothing could be done except to allow the Cubans to arrive and then formulate, on a post hoc basis, a plan to process and resettle them. When the plan was developed, it also took into account the Haitians who had entered the United States during this period. The Carter Administration estab-

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[16] Joint Pretrial Stipulation, docket no. 336, filed March 2, 1982, Par. 5(1)-(4).

[17] The number of Haitians apprehended during this period indicates a trend of increased migration to the shores of South Florida. The logical inference to be drawn from this data is that the policy of parole in conjunction with work authorization "provided the greatest inducement to the ultimate swollen tide of incoming undocumented Haitians." *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 at 1029 n.11 (11th Cir. 1982).

lished a "Cuban/Haitian" entrant status for all Cubans who arrived in the United States between April 21 and June 20, 1980, and for all Haitians who arrived prior to June 20.

The Carter Administration's plan did no more than assign an immigration status to these aliens and assist them in the efforts to resettle them. The local communities were left with the task of providing jobs, housing, health care and food for the approximately 150,000 new residents of South Florida. This burden taxed local resources to their limits and continues to do so.

B. POLICY CHANGE

In February 1981, the Select Committee on Immigration that was appointed by the Carter Administration issued a report that concluded what this community was already painfully aware of: an immigration crisis exists in this country. As a result, President Reagan, in March 1981, convened a special task force to consider the continuing problem of illegal immigration into the United States. The Attorney General presided over the task force which consisted of the cabinet officers in charge of the Departments of State, Defense, Transportation, Labor, Commerce, Health and Human Services and the Director of the Office of Management and Budget.

The task force recognized the tremendous problems created by illegal immigration, particularly at a time of inflation and unemployment, and noted that the public "[c]oncern has been heightened by the mass influx of Cubans and Haitians into South Florida and the continuing arrivals of refugees from other parts of the globe." Materials were submitted to the task force demonstrating that there were anywhere between three to six million people, possibly more, here illegally and that we had developed an underground society in America. Because these people constantly lived in fear of being deported, they were particularly vulnerable to unfair

labor practices, as well as other forms of economic intimidation. In addition, the task force found that illegal aliens became associated with criminal acts and even when they were not participants, they would not come forward as either victims or witnesses of crimes.

The task force attempted to develop comprehensive solutions to deal with these and other problems resulting from continuing illegal immigration and the presence in American society of large numbers of illegal aliens. The policy proposals that came out of the task force can best be described by dividing them into two categories. The first proposal was designed to deal with those illegal aliens already present in the United States. Rather than waste the resources that would be necessary to apprehend, bring deportation proceedings and possibly expel these people, the task force recommended to the President that there be an amnesty program to legalize the status of the illegal alien population. Having made this decision, a second group of proposals dealing with aliens unlawfully coming to the United States was necessary.

The task force was concerned that an amnesty program, particularly on so large a scale, would encourage even more illegal immigration by persons seeking to obtain the benefits thereof. Accordingly, the task force also recommended increased efforts to enforce the immigration laws as written and proposed new legislation designed to correct problem areas in the existing legislation. One of the major new policies that was recommended and adopted were sanctions against employers who employ illegal aliens. This was designed to remove one of the motivations to come here illegally. Another proposal was to amend the criminal laws so that it clearly became a crime to bring aliens illegally into the country regardless of whether it is done surreptitiously or openly as it was done during the Mariel Boatlift. Such a statute would hopefully deter another Mariel. It was also recommended that there be a return to a policy of detaining aliens until

they can establish to INS' satisfaction a prima facie claim for admission to this country.[18]

The President approved the recommendations of the Task Force with respect to an amnesty proposal and increased enforcement efforts, including detention.[19] In

[18] Detention is not a new concept in the field of immigration law. During the late 1940's and early 1950's it was a routine practice. However, in 1954, when the Ellis Island detention facility was closed, the policy was established that aliens seeking admission into the United States should not be placed in physical incarceration unless they were a security risk or likely to abscond. This policy was never formally promulgated.

Under the policy adopted in 1954, at least 95% of aliens whose admissibility was questioned were not subject to detention. Since then, hundreds of thousands of aliens have been released including a large number of aliens whose admissibility was questioned. Aliens making political asylum claims were generally granted deferred inspection, a form of parole, while their claims were processed. These aliens need not have documents. *See Pierre v. United States*, 547 F.2d 1281, 1283 (5th Cir. 1977), *vacated and remanded*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977). The parole practice never distinguished between persons who were documented or undocumented or whose documentation was challenged.

[19] On June 26, 1981, the Attorney General sent a memorandum with attached decision packets to the President of the United States. One of the packets was designated as the "Cuban/Haitian Problem". Under that heading in the attached paper, Option 1 ["Status Quo"] was not recommended by any of the advisors, Option 2 ["Limited Interdiction plus Status Quo Non-detention"] was recommended only by the Department of Transportation and Frank Hodsol, and Option 3, ["Interdiction and Detention"] was recommended by the Department of State, Justice, Treasury, Labor and HHS. This option, which ultimately was the policy announced by the Reagan Administration was analyzed as follows:

> "Detention could deter continuing illegal immigration reducing adverse community impact . . . But detention risks camp overflowing because of procedural delays . . . Detention could create an appearance of 'concentration camps' filled largely by blacks."

Plaintiffs' Exhibit 4 at page 8.

Thus, it is apparent that detention was approved in spite of the potentially adverse effects of the appearance of discrimination. The evidence in this regard does not support Plaintiffs' position that the Administration acted with a discriminatory purpose or motive.

addition, he approved a limited proposal to interdict the flow of illegal immigration from the Caribbean.

Thereafter, on July 30, 1981, the President issued a statement on the immigration policy of this nation. That statement noted that "[i]mmigration and refugee policy is an important part of our past and fundamental to our national interest." Moreover, the statement emphasized the need to "establish control over immigration" and pointed out that the Attorney General was taking administrative actions as well as submitting proposed legislation designed to guarantee that foreigners were admitted to the United States "in a controlled and orderly fashion . . ."[20]

That same day the Attorney General appeared before a joint session of the Senate Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration, Refugees and International Law. The Attorney General advised Congress that "we have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." In that connection, the Attorney General noted that the Government's attempt to screen and process those seeking entry into the United States has simply "crumbled under the burden of overwhelming numbers." As part of the overall plan to regain control over the borders, the Attorney General emphasized the "necessity of detaining illegal aliens pending exclusion."[21]

Part of the new immigration program approved by the President called for more restrictive use of parole and increased use of detention. However, the Task Force's proposal in this area, and the statute on which they relied, did not indicate to those who had to administer the new policy which excludable aliens were to be detained. Justice

[20] Plaintiffs' Exhibit 31.

[21] *Id.*

Department and INS personnel were given the responsibility to develop the specific aspects of this plan.

The people in charge of drafting the detention guidelines were cognizant of the fact that the new policy was not applicable to all excludable aliens. INS never intended to physically incarcerate persons who complied with the prescribed procedures for admission but were excludable on minor, technical grounds such as a clerical error on their visa. The policy was designed to deal with another Mariel type situation, regardless of the nationality or number of the arriving aliens. Therefore, the guidelines for detention had to reflect the perceived characteristics such a group of aliens would have. The problem was isolating these characteristics and incorporating them into guidelines that were capable of being objectively applied in individual cases.

The President did not specify whether the development of specific detention and parole criteria was to be accomplished internally by INS or through a rulemaking procedure in which the public could participate. *INS elected to do neither.* They admitted to the Court that they made a conscious decision not to promulgate a rule pursuant to the Administrative Procedure Act. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission.

Defendants can point to no operating instruction, internal memorandum or other document that completely reflects the official detention policy. Consequently, the Court cannot precisely define the criteria for detention any better than the Government's witnesses articulated them.[22] However, the general theme that emerges from

[22] Plaintiffs' Exhibit 71C (Declaration of Alan Nelson); Transcript at 2180, 2269-70; deposition of Doris Meissner, Sept. 1, 1981, at p. 5-8. No two explanations were alike.

the evidence is that aliens are to be detained unless and until they establish to INS' satisfaction a prima facie claim for admission.[23] Within this framework, the District Director had no discretion to grant deferred inspection to Haitians arriving aboard non-signatory carriers without first placing them in detention.

C. THE CLASS—THE EVIDENCE

The evidence shows that prior to May 20, 1981, Haitian refugees arriving in this country, for whom the INS initiated exclusion proceedings, were detained for a brief period of time necessary for routine public health screening and released on parole into the community to relatives or voluntary agencies willing to act as sponsors. This "policy" abruptly changed sometime between May 20, 1981 and July 31, 1981; and a policy of detention was initiated.

Notwithstanding the fact that there are no clear guidelines for who should be detained and who should be paroled, INS has continued to enforce the new policy.[24] As

[23] In referring to "criteria for detention" the Court means those factors that would be considered by the immigration inspector in determining whether an excludable alien should be given a deferred inspection or placed in detention. Parole criteria are factors to be considered in determining whether an alien in detention should be released.

[24] The Court believes that the inconsistencies between what the Government witnesses said the policy was and the policy their subordinates were carrying out can be attributed to the absence of guidelines for detention and parole. For example, the evidence shows that the failure to define who is a minor and what efforts should be made to reunify families sometimes had cruel results.

MR. ROSEN:

Q Joel, would you state your name, please.

A Joel Girardin.

Q Joel, how old are you?

A Fifteen.

Q When did you first arrive in this country?

A On October 12th, 1981.

[Continued]

of the date of this Order, pursuant to this policy, some class members have been in detention for over 11 months awaiting a determination on their claims for admission.

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[24] [Continued]

Q And were you arrested immediately upon entering this country?

A Yes.

Q Where were you taken, Joel?

A To Krome.

Q Have you been at Krome ever since October 12th?

A Yes.

Q Joel, do you have any family here?

A Yes.

Q Who?

A I have my aunt here and my cousin.

Q Where does your aunt live?

A Miami.

Q Do you have any family in Krome, Joel?

A Yes, a brother of mine.

Q How old is he?

A Twenty-three.

Q Joel, are you able to stay with your brother in Krome?

A No. They don't put me in the same place as he.

Q Do you know why?

A No.

BY MR. KURZBAN:

Q Can you state your full name for the record please?

A Hendrick DeSulme.

Q Mr. DeSulme, when did you come to the United States?

A August 9, 1981.

Q Did you come here alone or were you accompanied by anyone?

A Accompanied by my cousin and my child.

Q How old is your child?

A Two.

Q Boy or girl?

A A boy.

[Continued]

The Court heard testimony that some non-Haitians in exclusion proceedings were not detained even though they arrived after the effective date of the new policy. Most of the testimony in this regard was general but some specific examples were given. While it appeared some of these individuals were clearly excludable, the evidence was insufficient to establish that they had similar immigration status but were treated differently than Plaintiffs.

In addition to the testimony regarding disparate treatment, both parties introduced documentary evidence on the number of Haitians versus non-Haitians being detained and paroled. The evidence shows that both Haitians and non-Haitians are being detained, but that more Haitians are being detained and for longer periods of time than non-Haitians. The evidence also demonstrates that a larger percentage of non-Haitians are

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[24] [Continued]

Q When you said before they asked you who should take care of whether or not your child could go with your cousin?

A Yes.

Q Your cousin was in the camp at the time?

A Yes. She was on the female side.

Q They did not release your son at that time?

A Never.

Q How long was your son at Krome?

A A month and a half.

Q When your son was released, did you ask to be released also?

A They had transferred me to Otisville. They had kept my child and released him after I left.

Q Did you tell immigration anything with respect to whether or not you wished to be transferred because your son was at Krome?

A When I was being transferred I called Mr. Garcia and I told Mr. Garcia, my child is my own child. He has lost his mother. I am his mother and his father both. That means that wherever I go is where he should be. He told me, "shut up."

granted parole or deferred inspection than the percentage of Haitians. Plaintiffs' expert statistician interpreted this data to mean there is a statistically significant relationship between being detained and being Haitian. The Court does not quarrel with this conclusion but believes that it does not deserve much weight in determining the merits of Plaintiffs' discrimination claim.

Parole is not a random process and the probability of parole is not the same for every person. The decision to grant a deferred inspection takes into account many factors not contained in the data analyzed by Plaintiffs' statistician. Factors that may be considered include the age and health of the alien as well as the reason he does not appear entitled to enter this country. Other factors include being accompanied by a minor and pendency of an I-130 application. These factors, with the exception of documentation, were not separately analyzed by Plaintiffs' expert. With regard to his analysis of the significance of possessing documents it was far too simplistic because it did not distinguish between the types of documents possessed and the facial validity thereof. The evidence before the Court simply did not establish the existence of a statistically significant relationship between being detained and being Haitian in the context of similarly situated individuals. The only conclusion that can be drawn from this evidence is that Haitians are being impacted by the detention policy to a greater degree than aliens of any other nationality at the present time.

Detention was not and is not intended to be an end in itself. It was proposed and adopted as an integral part of an overall revision of our immigration policy. At or about the time detention began, other changes in the exclusion procedure were being implemented. These changes included (1) immediate service on the alien of a notice to appear for an exclusion hearing (I-122), (2) interviews with the alien prior to the hearing to determine the nature of his claim for admission and (3) mass exclusion hearings. In response to these changes in the

hearing procedure, this lawsuit was instituted.[25] On September 30, 1981 *nunc pro tunc* September 9, 1981, Judge Hastings entered a Temporary Restraining Order, later converted into a preliminary injunction, that prohibited the Defendants from holding exclusion hearings for class members.[26] That Order did not address the issue of the propriety of Plaintiffs' detention.

In the summer of 1981, the Krome detention facility became severely overcrowded. This condition resulted from a combination of factors including HRC's assumption of legal responsibility for representing over 500

[25] The Complaint originally contained seven counts that challenged a broad range of policies and practices utilized by INS during exclusion proceedings. In a prior Order, this Court held that Section 106 of the Immigration and Nationality Act (hereinafter ("INA"), 8 U.S.C. § 1105a, precluded judicial review of four entire counts and portions of two other counts. That ruling was based on the Court's finding that Congress intended the procedure set forth in Section 1105a to wit, habeas corpus, to be the sole and exclusive means to challenge determinations made during the incident to exclusion proceedings. In addition, the Court found that habeas corpus was available to challenge those determinations only after a final order of exclusion had been entered and all available administrative remedies were exhausted. *See Louis v. Meissner*, 532 F.Supp. 881 (S.D. Fla. 1982).

Two issues, set forth in three counts, survived the Court's Order of Dismissal. The first issue, and the question of primary importance to these class members, is whether they are lawfully being detained pending the outcome of their exclusion proceedings. The second issue is whether persons in detention have a right of access to persons on the outside, and vice versa.

In light of the dismissal the Court intimates no view on the propriety of the putatively illegal practices. Testimony in this regard was admitted solely for the purpose of establishing discrimination in that these practices allegedly departed from normal exclusion procedures and were applied solely to Haitians. While the Court believes these practices to be a departure from the normal procedures, it does not find that they were applied solely to Haitians or that the Defendants implemented these practices with any intent to discriminate against Plaintiffs due to their race and/or national origin.

[26] *Louis v. Meissner*, 530 F.Supp. 924, 926 (S.D. Fla. 1981).

Haitians detained at Krome, the filing of this lawsuit and subsequent injunction of exclusion proceedings by Judge Hastings and the continuous flow of Haitians into South Florida.

In July 1981, the State of Florida instituted suit against the Federal Government because of the overcrowding at Krome. In the course of the litigation, the Government represented that efforts would be made to keep the population at Krome at or under 1000 persons. In order to abide by this representation to the Court, the Government had to start transferring Haitians out of Krome whenever the population exceeded 1000.

As space became available in July 1981, the Government transferred Haitians from Krome to other INS detention locations, including Fort Allen, Puerto Rico; Brooklyn, New York, and to facilities made available by the Bureau of Prisons in places such as Otisville and Raybrook, New York; Latuna and Big Springs, Texas; Lexington, Kentucky; Morgantown and Alderson, West Virginia.[27] Pursuant to the new detention policy, ap-

[27] The Court finds that the transfer of Haitians to these areas was necessary in order to comply with the Government's representations in the suit brought by the State of Florida regarding the population at the Krome detention facility. *Graham v. Smith*, Case No. 81-1497-CIV-JE (S.D. Fla.). *See* Defendants' Exhibit C. The evidence does not support Plaintiffs' contention that these transfers were intended to deny Plaintiffs' access to counsel and to punish or otherwise discriminate against Plaintiffs. However, the evidence does indicate that no effort was made by INS to determine whether the Haitians being transferred were represented by counsel in Miami, or had relatives in Miami (in or out of detention). Notice of the transfers, and the purpose and method thereof, was not given to the Haitians in order to allow them to notify their family and to alleviate any fears they may have had that they were being sent back to Haiti. Moreover, once the Haitians arrived at their respective destinations, they were not given access to telephones so they could contact their families and friends. Thus, the transfers were necessary but the manner in which they were carried out left much to be desired. *See Order Granting in Part and Denying in Part Defendants' Motion for Permission to Transfer Class Members*, docket no. 385, dated March 26, 1982.

proximately 2100 individual Plaintiffs continue to be incarcerated in these various detention facilities.

D. THE CLASS—PLAINTIFFS' CLAIMS

The plaintiffs' herein are the Haitian Refugee Center, Inc., Lucien Louis, Wilner Luberisse, Jean Louis Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard, Joel Casimir, Job Dessin and Prophete Talleyvand, on behalf of themselves and all others similarly situated.[28] The class certified by the Court consists of:

> All Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and also are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and are either:
>
> 1) Unrepresented by counsel;
>
> or
>
> 2) Represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.

Plaintiffs have advanced a two-prong attack on the Government's new detention policy. They argue first that

[28] Plaintiff, Haitian Refugee Center, Inc. (hereinafter HRC) is a not-for-profit corporation organized under the laws of the State of Florida on September 17, 1980. The stated purposes of HRC are to "promote the well-being of Haitian Refugees through appropriate programs and activities" including but not limited to legal representation. The by-laws of HRC were approved on February 27, 1981, and provide that HRC's membership consists of "the Haitian Refugee Community in Florida and members of the community at large who have shown support and interest for the defined purposes and activities of the corporation". Defendants' Exhibits D and E.

Plaintiffs, Lucien Louis, Wilner Luberisse and Job Dessin have been paroled by INS.

before the policy was instituted, they were entitled, under the provisions of the Administrative Procedure Act (hereinafter "APA"), to notice and an opportunity to comment. *See* 5 U.S.C. § 553. INS' failure to follow this procedure, they claim, requires this Court to find their detention to be unlawful. Second, Plaintiffs contend that the detention policy is discriminatory on its face in that only Haitians fall within its purview. In the alternative, if the policy is construed to apply to all excludable aliens, Plaintiffs claim it is being applied unequally to their detriment. Thus, the essence of their second argument is that the detention policy is illegal because it is discriminatory on its face and/or in its application. Plaintiffs claim such discrimination violates the Equal Protection guarantees of the Fifth Amendment to the United States Constitution as well as the provisions of Articles 3 and 31 of the United Nations Convention and Protocol Relating to the Status of Refugees, to which the United States is a signator. *See* 19 UST 6260 T.I.A.S. No. 6577 (the "Convention"); 19 UST 6223, T.I.A.S. No. 6557 (the "Protocol").

E. JUSTICIABILITY

Prior to contesting the merits of the claims before the Court, Defendants raised three issues of justiciability: exhaustion of administrative remedies, the political question doctrine and standing. Some of these issues have been partially addressed in a prior Order of the Court but apparently they have not been put to rest.[29] Because these challenges go to the heart of the Court's

[29] The Court's Order of Dismissal, note 25, *supra*, only dealt with the question of whether 8 U.S.C. § 1105a barred the Court from exercising jurisdiction over Plaintiffs' claims. It was not intended to be dispositive of all Defendants' jurisdictional and sufficiency challenges to the complaint. Although the Court addressed the exhaustion and standing issues in that Order, it did so solely in the context of the claims dismissed and did not specifically deny Defendants objections to Plaintiffs' APA and discrimination claims.

power to adjudicate the case before it, the Court will take this opportunity to set forth its reasons for exercising jurisdiction.

1. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants contend that this lawsuit is an improper attempt to procure the release *en masse* of detained Haitians even though they have made no showing that some or all of the aliens have requested parole and parole has been denied. Until Plaintiffs request the District Director to exercise his discretion to parole them, Defendants believe judicial intervention is inappropriate.

Plaintiffs have countered this argument by introducing evidence that some, if not all, of the class members have requested parole. The evidence consists of written requests for parole made on behalf of Haitians in detention by relatives, the Haitian Refugee Center, Inc., privately retained attorneys, pro bono attorneys, and religious and charitable organizations. There is also testimony that class members regularly make oral requests for release to the INS officials at the various detention facilities.[30] Plaintiffs argue that the Court should take jurisdiction over their claims even if the evidence does not support a finding that all class members requested parole because their claims fall within certain exceptions to the exhaus-

[30] The Court finds that all of the Plaintiff class members did not request parole. However, the Court believes INS had constructive and/or actual knowledge that Plaintiffs wanted to be released.

Moreover, it is significant to note that the administrative procedure for seeking parole does not require an application to be filed, a hearing to be held or a record to be made. *See* 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5; INS O.I. 212.5a. Thus, an excludable alien may be paroled, or granted a deferred inspection by the examining immigration officer at the airport or seaport without ever asking for parole. The District Director's decision to grant or deny parole is not reviewable by the BIA and appears to be a final order thereby reviewable in this Court. *See* 8 C.F.R. § 3.1(b); *Pierre v. United States*, 547 F.2d 1281, 1284-86 (5th Cir. 1977); *Ahrens v. Rojas*, 292 F.2d 406, 410 (5th Cir. 1961).

tion rule and a balancing of equities mandates judicial intervention at this time.

A party will normally be denied judicial relief until the administrative remedies available to him have been exhausted. By refusing to interrupt the administrative process, several policies are advanced; (1) a more complete record is developed; (2) the agency is allowed to exercise its discretion or expertise; (3) the agency is allowed to correct its own errors and (4) the agency is not weakened by easy circumvention of its procedures. *See generally Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408 (1938); *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 S.Ct. 459, 82 L.Ed. 638 (1938); *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1567, 23 L.Ed.2d 194 (1969).

However, the exhaustion doctrine should not be rigidly applied. It is a flexible concept that must be tailored to the administrative statutes and circumstances peculiar to the case. Thus, the failure of one or more of the Plaintiffs to exhaust his administrative remedies does not automatically preclude the Court from hearing their claims.[31] That decision must be based on a balancing test that employs the policy factors favoring exhaustion and the circumstances peculiar to Plaintiffs' case that favor judicial review. *See Ecology Center of Louisiana Inc. v. Coleman*, 515 F.2d 860 (5th Cir. 1975).

Continuous use of the balancing test has resulted in the judiciary's development of several exceptions to the exhaustion rule. In *Patsy v. Florida International University*, 634 F.2d 900 (5th Cir. 1981) the Fifth Circuit, sitting *en banc*, stated:

> Briefly the traditional exceptions are *first*, exhaustion is not required when the prescribed administrative remedy is plainly inadequate because either no remedy is available, the available remedy will not give relief commensurate with the claim, or the remedy would be so unreasonably delayed as to create a serious risk of irreparable injury. *Walker v. Southern Railway*, 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294 (1966); *Frozen Food Express v. United States*, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 910 (1956); *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 66 S.Ct. 1000, 90 L.Ed. 1192 (1946); *United States Alkali Export Association v. United States*, 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945): 3 K. Davis, Administrative Law § 20.07 (1958 and Supp. 1970, 1976 & 1978).
>
> *Second*, when the claimant seeks to have a legislative act declared unconstitutional and administrative action will leave standing the constitutional question, exhaustion is not required. *Public Utilities Commission v. United States*, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958); Davis, *supra*, at § 20.04.
>
> *Third*, courts do not require exhaustion when the question of the adequacy of the administrative remedy is for all practical purposes co-extensive with the merits of the plaintiff's claim, such as when, for example, the plaintiff contends that the administrative system itself is unlawful or unconstitutional in form or application. *Fuentes v. Roher*, 519 F.2d 379 (2d Cir. 1975); *Finnerty v. Cowen*, 508 F.2d 979, 982-83 (2d Cir. 1974).
>
> *Fourth*, exhaustion of administrative remedies is not required if it would be futile to comply with the administrative procedures because it is clear that the

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[31] Exhaustion is not a jurisdictional prerequisite to review. Whether exhaustion should be required is a matter committed to the sound discretion of the trial court. *NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 419, 426 n.8, 88 S.Ct. 1717, 1719, 1722 n.8, 20 L.Ed.2d 706 (1968); *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 865-66 (5th Cir. 1975).

claim will be rejected. *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24, 54 S.Ct. 259, 78 L.Ed. 628 (1934); *Montana National Bank v. Yellowstone County*, 276 U.S. 499, 48 S.Ct. 331, 72 L.Ed 673 (1928).

634 F.2d at 903-04.

In the case at bar, the Court believes that the third and fourth exceptions to the exhaustion rule make Plaintiffs' claim justiciable. The administrative remedy available is co-extensive with Plaintiffs' claim in that the form and application of the remedy is under attack on statutory and constitutional grounds. Clearly, INS has no power to adjudicate the legality of its own policy under the provisions of the APA and the agency is similarly incapable of resolving the challenges to the manner in which the policy is applied. Moreover, its incapacity in this regard leads the Court to conclude that further attempts for administrative relief would be futile. The Court can see no rational purpose for requiring these class members to seek relief from the INS, since the law never requires one to do a useless act; here such a request would, with few exceptions, fall on deaf ears.

Nor does the Court feel that the policy factors favoring exhaustion will be advanced by requiring these Plaintiffs to request parole at this time.[32] First, the record before

[32] On June 14, 1982, the Attorney General announced a plan for the release of Haitians currently in detention, some of whom are class members. That announcement was made subsequent to the Court's decision in this case but prior to the issuance of this opinion. It is the view of the Court that the planned release in no way moots the issues herein and that it must be disregarded to the extent it might appear to bear upon the issue of discrimination.

INS' implementation of the Attorney General's parole plan does not affect the Court's analysis of the exhaustion issue. Because the Court is not reviewing individual parole decisions, further development of the administrative record would not materially aid the Court in making its decision as to whether the detention policy is unlawful.

the Court is satisfactory in that it establishes the current criteria for release on parole. Individual administrative records are not necessary because the Court is not being asked to review individual parole decisions. The issue before the Court is legal, not factual, and further development of the administrative record would not significantly aid judicial review.[33] Second, allowing the agency to exercise its discretion would accomplish nothing if, as Plaintiffs allege, the District Directors either have no discretion to parole them, or use unlawfully adopted criteria for release when exercising their discretion.[34]

Finally, the Court is of the view that additional requests for parole will not result in a decision to change or correct this allegedly unlawful policy. Without a judicial determination that Plaintiffs' detention is unlawful, it appears that many of them will remain in custody and under these circumstances, allowing them to challenge their detention will not weaken the established administrative mechanism to attain release on parole.

Thus, after balancing the harshness of requiring exhaustion and the apparent inability of INS to provide relief against the factors favoring exhaustion, the Court finds that a dismissal on this ground is unwarranted. *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 1975).

[33] The APA claim is strictly a legal issue and probably could have been resolved by summary judgment based on the parties' pretrial stipulation. Plaintiffs' discrimination claim is both factual and legal in nature. Whether the policy is discriminatory on its face is factual in that the parties do not agree on what the policy is. Whether the policy is being applied in a discriminatory fashion is also disputed. Notwithstanding the existence of these issues of fact, the court's decision would not have been aided by further development of the administrative record because the Court dismissed that portion of the complaint that individual parole and asylum claims were denied on discriminatory grounds. *See Louis v. Meissner*, 532 F.Supp. 881 (S.D. Fla. 1982).

[34] The Court does not believe INS has any particular expertise in deciding which aliens are good candidates for parole.

2. THE POLITICAL QUESTION DOCTRINE

The essence of Defendants' second challenge to the justiciable nature of this lawsuit is that:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. (Citations omitted).

Mathews v. Diaz, 426 U.S. 67, 81, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976). Parole of Haitians, Defendants contend, raises political questions over which this Court does not have jurisdiction.

It is inconceivable that the decision whether to detain or parole these class members would have a significant impact on the manner in which this country conducts its foreign policy. Assuming *arguendo* that the decision to detain excludable aliens is "intricately interwoven" with our foreign policy, the political question doctrine is inapplicable. The Court has not been called upon to determine the propriety of the detention policy and it intimates no view on the wisdom of the Administration's decision in this regard. Plaintiffs are asking the Court to decide whether their statutory and constitutional rights are being violated. To ensure that individuals are not injured by unlawful action in the immigration and naturalization context, courts rarely apply the political question doctrine when such challenges are brought. As one treatise notes:

> Finally, the pervasive influence of the political question doctrine on fields touching on foreign affairs has not led courts to surrender their power to protect individuals against government action. To the contrary, individual rights are protected carefully, although within a framework that takes account of the broad substantive powers of the other branches. *Harisiades v. Shaughnessy*, [342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952)] provides a much-invoked illustration. Ultimately the Court upheld the challenged deportation order, and it spoke tenderly of the threads weaving policy toward aliens into the pattern of political judgments dealing with foreign affairs. But it decided on the merits challenges based on due process, the First Amendment, and the ex post facto clause. Respect for the political branches affects, but does not preclude, decision on the merits.

13 Wright & Miller, Federal Practice and Procedure § 3534 at 314 (1976). (Footnotes omitted). For these reasons, the Court believes this case is justiciable notwithstanding the Supreme Court's admonition in *Mathews v. Diaz*, *supra*.

3. STANDING

The "three-part test [for standing to contest the validity of agency actions] established in *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970) and *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) . . . is: (1) the challenged action must result in injury-in-fact to the plaintiffs; (2) the interest invaded must be arguably within the zone of interest to be protected by the statute; and (3) there must be no statutory prohibitive of judicial services." *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1066 (5th Cir. 1979).

The injury-in-fact element of the standing test requires Plaintiffs to demonstrate a sufficiently direct and concrete injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), which is likely to be readdressed if Plaintiffs prevail on the merits. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977); *Simon v.*

Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). The Plaintiff class members in the case *sub judice* have met this constitutional requisite for standing; their injury-in-fact consists of their continued, allegedly illegal, incarceration pending resolution of their political asylum claims.[35]

The second element of the standing test is mandated by the APA. A person who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof" under Section 10(a) of the APA. 5 U.S.C. § 702. A plaintiff satisfies the APA's standing requirement if his interests are arguably within the zone of interests that the statute in question was intended to protect or regulate. *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). The "relevant statute" is the agency's enabling act or other legislation under which the zone of interests is purported to exist. 5 B. Mezines, J. Stein & J. Gruff, Administrative Law § 50.03, at 50-25 (1980).

The Court believes that the "relevant statute" in the case at bar is Section 212(d)(5) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(d)(5); the statute which the agency's new policy authoritatively interprets.[36] *State of Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974). Although the statute speaks in terms of parole "for emergent reasons or for reasons deemed strictly in the public interest", parole has been characterized by

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[35] The Court believes that injury-in-fact is sufficient to confer standing on Plaintiffs. However, the Fifth Circuit apparently takes the position that injury alone is insufficient and, therefore, the Court will address the other aspects of the standing doctrine. *See Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (Bazelon, C. J.).

[36] Plaintiffs' standing to invoke Constitutional Protection is discussed in Section H1, *infra*. The Court notes, in light of that conclusion that Plaintiffs' claims fall within the zone of interest protected by the Constitution.

the Supreme Court as a "device through which needless confinement is avoided while administrative proceedings are conducted." *Leng May Ma v. Barber*, 357 U.S. 185, 190, 78 S.Ct. 1072, 1075, 2 L.Ed.2d 1246 (1958). Viewed from the latter perspective, the interests Plaintiffs seek to advance, to wit, freedom pending resolution of their asylum claims, are arguably within the zone of interests sought to be protected by Section 212(d)(5) of the Immigration & Naturalization Act.

The final question is whether judicial review of agency action is prohibited. The Court's consideration of this question must of necessity encompass Defendants' claim that decisions regarding parole are not judicially reviewable because release on parole is committed to agency discretion within the meaning of Section 10 of the APA, 5 U.S.C. § 701(a)(2), by 8 U.S.C. § 1182(d)(5)(A).

As a general rule, "a person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. The general rule applies "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2).

The exception from APA review of agency action "committed to agency discretion" is a very narrow exception. *Save the Bay, Inc. v. Administrator of the E.P.A.*, 556 F.2d 1282, 1293 (5th Cir. 1977). The legislative history of the APA, referred to in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), indicates that the committed to agency discretion exception to judicial review is intended to be "applicable in those *rare* instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)." *Id.* at 410, 91 S.Ct. at 820 (emphasis added).

In construing 5 U.S.C. § 701(a) the Supreme Court has stressed the "basic presumption of review." *Abbott Labo-*

ratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). The burden of proving non-reviewability is on the agency involved. *See Id. Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *See Morris v. Gressets*, 432 U.S. 491, 501, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977); *Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971); *Tooahnippah v. Hickel*, 397 U.S. 598, 606, 90 S.Ct. 1316, 1321, 25 L.Ed.2d 600 (1970); *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 155-57, 90 S.Ct. 827, 830-31, 25 L.Ed.2d 184 (1970); *Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970). The reviewing court must determine "whether Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Morris v. Gressette*, 432 U.S. 491, 501, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977); *Barlow v. Collins*, 397 U.S. 159, 165, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970).

As no provision of the Immigration and Naturalization Act expressly precludes judicial review of the Attorney General's action under § 212(d)(5), it is necessary to determine "whether unreviewability can fairly be inferred."[37] 397 U.S. at 166. *See Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 157, 90 S.Ct. 827, 831, 25 L.Ed.2d 184 (1970); *Switch-*

[37] The Defendants do not contend that such a provision exists and rely instead on the argument that preclusion of judicial review may be inferred from the statutory scheme. This position is contrary to that taken by the Defendants with regard to INS' policies and practices used during or incident to exclusion proceedings. See Defendants' Memorandum in Support of their Motion to Dismiss, docket no. 114, filed Sept. 30, 1981, at p. 24.

men v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943); *Morris v. Gressette*, 432 U.S. 491, 501, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977). That inquiry requires an evaluation of the legislative scheme as well as the practical and policy implications of judicial review. *Bullard v. Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), *cert. denied*, 451 U.S. 907, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981); *Local 2855 v. United States*, 602 F.2d 574, 575 (3rd Cir. 1969).

> There must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process. *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969). Criteria suggested by the Third Circuit in Local 2855 for making such a determination include (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.

623 F.2d at 1046.

Section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) provides in part "[t]he Attorney General may . . . in his discretion parole into the United States temporarily and under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States . . ." The Attorney General's discretion has been delegated to the District Directors by regulation, see 8 C.F.R. § 212.5, and the District Director has further delegated that authority to his subordinates provided they are not below the level of an officer in charge or an immigrant inspector in charge of a port of entry. *See* INS Operations Instruction 212.5

The fact that the statute by its terms permits rather than compels, agency action does not alone commit that action to the agency's unreviewable discretion. *See Mulloy v. United States*, 398 U.S. 410, 90 S.Ct. 1766, 26 L.Ed.2d 362 (1970); *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); cited in *Save the Bay, Inc. v. Administrator of the E.P.A.*, 556 F.2d 1282, 1293 (5th Cir. 1977). Nor can nonreviewability be inferred from the apparently broad discretion given INS in this area of operation. For many years, the statute's language has been construed to mean that aliens seeking admission to the United States should not be placed in physical incarceration unless they were a security risk to the United States or likely to abscond. This interpretation was recognized by the Supreme Court in *Leng May Ma v. Barber*, 357 U.S. 185, 190, 78 S.Ct. 1072, 1074, 2 L.Ed.2d 1246 (1958) and by INS in its Immigrant Inspector's Handbook. INS' Operations Instruction and the regulations, 8 C.F.R. § 212.5, appear to be consistent with this expansive reading of the parole provision because they give INS officials broad discretion to grant release on parole. Thus, the statute delineates some limits on INS' discretion to parole aliens and thereby provides a standard for courts to decide in particular cases whether there has been an abuse of discretion and application of the criteria require no special knowledge or expertise.

The need for judicial review of parole decisions is apparent. Regardless of their status as excludable aliens, Plaintiffs are persons within the territorial jurisdiction of the United States and they cannot be denied their liberty without due process of law. *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976); *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 (11th Cir. 1982).[38] Judicial review is the only means to

[38] See note 14, *infra*. *Pesikoff v. Sec. of Labor*, 501 F.2d 757, 760 n.3 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1038, 95 S.Ct. 525, 42 L.Ed.2d 315 (1974).

insure that aliens seeking parole get the process they are due. An alien's challenge to a denial of parole in no way affects or impedes INS' ability to proceed to determine his admissibility; and, therefore, the Court believes judicial review is feasible without disruption of the administrative process.

After reviewing the statute, regulations and legislative history thereof, the Court has been unable to find "clear and convincing evidence" that Congress intended to cut off judicial review of parole decisions. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1969). Clearly, the Attorney General's decision involves some degree of discretion of judgment. But it cannot be said that, for this reason, his actions are unreviewable. Moreover, the Court believes that the need for and feasibility of judicial review far outweighs the potential disruption of the administrative process and it finds, therefore, that parole determinations are not committed to agency discretion by law and can be reviewed pursuant to 5 U.S.C. § 702.

Assuming *arguendo* that the substantive decision to parole is committed to agency discretion, judicial review is still available for limited, specific issues subsumed in the decision making process.[39] *See Ness Investment Corp. v. United States*, 512 F.2d 706 (9th Cir. 1975); *East Oakland Fruitvale Planning Counsel v. Rumsfeld*, 471 F.2d 524 (9th Cir. 1972); *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403, 92 S.Ct. 557, 30 L.Ed.2d 560 (1972); *Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282 (5th Cir. 1977).

[39] Admittedly the question of whether individual parole decisions are reviewable pursuant to 5 U.S.C. § 702 is a close one. An equally compelling argument can be made against much review in light of the availability with habeas corpus review. *Rodriguez Fernandez v. Wilkinson*, 654 F.2d 1382, 1390 (10th Cir. 1981); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982); *Soroa-Gonzales v. Civiletti*, 515 F.Supp. 1049, 1001 (N.D. Ga. 1981).

> Such partial review serves to protect individuals' interests adversely affected by agency action while imposing only limited acceptable intrusion upon the administrative process and the dockets of the federal courts. *See Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv.L.Rev. 367 (1968). Along these lines it has been said that "[T]he question is not whether agency action is by law committed to agency discretion but to what extent agency action is so committed." 4 K. Davis, Administrative Law Treatise 33 (1958), quoted in *Medical Committee for Human Rights, Inc. v. SEC, supra,* 432 F.2d at 673 (Emphasis in quote).

556 F.2d at 1293.

The circumstances where judicial review is appropriate, in spite of a finding that agency action is committed to discretion by law, was cogently analyzed by the Ninth Circuit in *Ness Investment Corp. v. United States,* 512 F.2d 706 (9th Cir. 1975). The conclusion reached by the court was:

> Where consideration of the language, purpose and history of a statute indicate that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency.

512 F.2d at 715.

Plaintiffs seek to have the criteria for release declared unlawful because it was adopted in violation of the APA.

Thus, the alleged abuse of discretion consists of a statutory violation not an error of judgment. Viewed from this perspective, the Court believes judicial review is permissible.[40]

In summary, the Court finds that Defendants' challenges to Plaintiffs' standing lack merit. Plaintiffs have met the constitutional requisite for standing in that their continued allegedly illegal incarceration constitutes injury-in-fact. They have met the APA's standing criteria because they fall within the zone of interest of persons that the relevant statute was intended to protect or regulate. Finally, there is no statutory bar to judicial review and the Court cannot find any clear and convincing evidence that Congress intended to commit parole decisions to agency discretion.

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[40] *See Pickus v. United States Board of Parole,* 507 F.2d 1107 (D.C. Cir. 1974) where under similar circumstances the District of Columbia Circuit held:

> We have considered the Board's argument that its promulgation of parole selection criteria is not subject to judicial review—whether or not subject to the Act—because release on parole is committed to agency discretion within the meaning of Section 10 of the Act. 5 U.S.C. § 701(a)(2), by 18 U.S.C. § 4203(a). But we are not reviewing the granting or denying of parole in a particular case, action which may reflect an unreviewable exercise of agency discretion. We are not even reviewing the merits of the rules and standards the Board has adopted. The appellees' complaint and our consequent adjudication address themselves solely to the procedures by which those rules may be formulated. The justiciability of such a complaint depends upon Section 10, particularly subsection (e), of the Act, as already discussed, not the discretionary character of the Board's determinations as to when parole shall be granted. The giving of notice of rule-making and the consideration of consequent submissions by interested persons might inform, but would not otherwise impinge upon, the Board's discretion in framing its standards and guidelines.

507 F.2d at 1107.

F. SUBJECT MATTER JURISDICTION

United States District Courts are tribunals of limited jurisdiction; their power to hear a case is dependent upon congressional implementation of one of the Constitution's grants of subject matter jurisdiction. Plaintiffs as unadmitted and nonresident aliens occupy a unique position in the law. It is clear that they have no right to enter this country as nonimmigrants or otherwise. *Turner v. Williams*, 194 U.S. 279, 292, 24 S.Ct. 719, 723, 48 L.Ed. 979 (1904); *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950); *Galvan v. Press*, 347 U.S. 522, 530-32, 74 S.Ct. 737, 742-43, 98 L.Ed. 911 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580, 592, 72 S.Ct. 512, 520, 96 L.Ed. 586 (1952); *Kleindeinst v. Mandel*, 408 U.S. 753, 762, 92 S.Ct. 2576, 2581, 33 L.Ed.2d 683 (1972). "Whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned." 338 U.S. at 544, 70 S.Ct. at 313. The Defendants would have this Court rule that because Congress, when enacting the Immigration and Nationality Act, did not provide for judicial review of denials of requests for parole, federal courts have no jurisdiction to hear Plaintiffs' challenges to their detention.

Under the APA "[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. A person may be just as "affected or aggrieved" by agency action if he is an unadmitted alien as he would be if he was admitted. The Supreme Court and the Fifth Circuit have made this clear in their rulings in *Brownell v. We Shung*, 352 U.S. 180, 185, 77 S.Ct. 252, 255, 1 L.Ed.2d 225 (1956) and *Estrada v. Aherns*, 296 F.2d 690 (5th Cir. 1961); *see generally* C. Gordon & H. Rosenfeld, *Immigration Law and Procedure* § 8.8 (1980) (and cases cited therein). Even in cases involving unadmitted aliens, "[e]xceptions from the . . . Administrative Procedure Act are not lightly to be presumed, *Marcello v. Bonds*, 349 U.S. 302, 310, 75 S.Ct. 757, 761, 9 L.Ed. 1107 (1955), and unless made by clear language or supersedure the expanded mode of review granted by the Act cannot be modified." 352 U.S. at 185, 77 S.Ct. at 255. Thus, the judicial review provisions of the APA apply to unadmitted aliens unless Congress makes its intent to the contrary clear as it did when it enacted Section 106 of the INA, 8 U.S.C. § 1105a, in response to the *We Shung* case. The mere absence of a provision in the INA for judicial review of parole decisions is not a clear indication that Congress intended to cut off judicial review. The Court finds, therefore, that its jurisdiction was properly invoked pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, 2202; and Section 10(a) of the Administrative Procedure Act 5 U.S.C. § 702, and 8 U.S.C. § 1329.

The Court also believes that federal question jurisdiction exists pursuant to 28 U.S.C. § 1331. The allegations herein are consistent with the Eleventh Circuit's ruling in *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 (11th Cir. 1982), in that Plaintiffs have claimed INS engaged in a "pattern, program or scheme . . . to violate [their] constitutional rights. . ." *Id.*, 676 F.2d at 1033. To the extent it is not clear from Plaintiff's amended complaint, the Court finds they have invoked habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241 and that jurisdiction exists pursuant to 8 U.S.C. § 1329 as well. *See Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1202-03 (9th Cir. 1975), and cases cited therein.[41]

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[41] The Court believes that its finding that jurisdiction exists to review parole decisions is consistent with all of the cases in this area. *Shaughnessy v. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed 956 (1953); *Ahrens v. Rojas*, 292 F.2d 406 (5th Cir. 1961); *Petition of Cahill*, 447 F.2d 1343 (2nd Cir. 1971); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982). While some of these courts found no merit to the aliens' claim for relief, jurisdiction to review those claims was never found to be lacking.

G. ADMINISTRATIVE PROCEDURE ACT CLAIM—FAILURE TO PROMULGATE DETENTION POLICY AS A RULE

The evidence shows that prior to May 20, 1981, Haitian refugees arriving in this country, for whom the INS initiated exclusion proceedings, were detained for a brief period of time necessary for routine public health screening and released on parole into the community to relatives or voluntary agencies willing to act as sponsors. This "policy" abruptly changed sometime between May 20, 1981, and July 31, 1981; and a policy of detention was initiated. Under the new policy, parole is to be denied except for significant humanitarian reasons such as pregnancy or other health problems, extreme age or for the purpose of reuniting families. Pursuant to this policy, some class members have been in detention for over 10 months awaiting a determination of their right to remain in the United States.

The essence of Plaintiffs' claim is that the detention policy is illegal because it is a substantive rule that was not promulgated as required by the Administrative Procedure Act (hereinafter the "APA"). Under the APA, an administrative agency is prohibited from adopting any substantive rule unless it first publishes notice of the proposed rule and provides interested persons an opportunity for comment. 5 U.S.C. § 553. Because this procedure was not followed, Plaintiffs claim the detention policy is void and unenforceable and that the Court must order their release.

Defendants admit that a new detention policy was instituted without employing rulemaking procedures, and that INS is an agency as defined by the APA. *See* 5 U.S.C. § 551(1). Notwithstanding these admissions, they contend Plaintiffs' APA claim lacks merit for two reasons. First, the Defendants say the change in detention practice is not a "rule" as that term is defined in 5 U.S.C. § 551(4). Second, assuming *arguendo* that the changes in detention and parole criteria constituted rule-

making, they argue the Attorney General's decision not to parole Haitian aliens would fall squarely within the Section 553(a)(1) and (b)(A) foreign policy and agency organization exceptions to the notice and comment requirements of 5 U.S.C. § 553.

Section 551(4) of Title 5 defines the word "rule" as:

> (4) the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting practices bearing on any of the foregoing.

This definition is inapplicable here according to the Defendants because "[i]n detaining the plaintiffs and other aliens, the Government is carrying out a clear legislative mandate. Accordingly, the Government need not rely upon any alleged rule of policy for its authority to detain plaintiffs. Instead, that authority is derived from an express statute." [42]

Although this argument appears to be initially convincing, when scrutinized, its superficial nature becomes readily apparent. The "legislative mandate" of section 235(b) is not as clear as Defendants would like the Court to believe.[43] Words used in statutes are to be given their

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[42] *See* Government's Reply Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, docket no. 223, filed Jan. 8, 1982, at 27.

[43] Section 235(b) of the Act, 8 U.S.C. § 1225(b) provides in part:

> Every alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.

ordinary meaning. *Perrin v. United States*, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979); *Malta v. Riddell*, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968); *Burns v. Alcala*, 420 U.S. 529, 95 S.Ct. 1180, 43 L.Ed.2d 469 (1975). Detain means not only "arrest" or "keep in custody" but also "to delay", "to retard", or "to restrain from proceeding". Black's law dictionary 404 (5th ed. 1979). The phrase "shall be detained" could mean an excludable alien shall be incarcerated until a final determination of his admissibility *or* that his entry into the United States should be delayed until inquiry is made at an exclusion hearing.[44] Parole is perfectly consistent with such a reading of section 235(b) because, by definition, parole "shall not be regarded as an admission of the alien. . ." 8 U.S.C. § 1182(d)(5). But regardless of which view of the statute is correct, this analysis demonstrates that INS' detention policy reflects *their* interpretation of the statute and, therefore, it is a rule as defined by the APA.

Even if section 235(b) evidences a Congressional intent to incarcerate excludable aliens, section 212(d)(5), not section 235(b) is the relevant statutory provision because section 212(d)(5) gives the Attorney General the power to release excludable aliens on parole.[45] The

[44] The Court has not been called upon to decide whether Congress intended the term "shall be detained" to mean incarceration or simply preventing an entry from being made. While this Court intimates no view on Congress' intent in this regard, it notes that the Fourth Circuit has interpreted this language to authorize indefinite incarceration of a permanently excluded alien after an unsuccessful attempt to return him to his homeland has been made. *Palma v. Verdeyen*, 676 F.2d 100, 104 (4th Cir. 1982).

[45] Section 212(d)(5)(A) of the Act, 8 U.S.C. § 1182(d)(5)(A) provides in part:

> The Attorney General may, in his discretion, parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

new parole criteria reflect INS' interpretation of the statutory conditions for release, to wit, "for emergent reasons or for reasons deemed strictly in the public interest." Clearly, when INS announced new criteria for release on parole, and the ensuing detention policy, it constituted an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." which is a rule within the meaning of the Act.

In order to engage in rulemaking, the Act requires an agency to (1) provide adequate advance notice and publication of the proposed rule in the Federal Register; (2) afford interested persons an opportunity to participate through the submission of written data, views, or arguments, with or without opportunity for oral argument; (3) publish the final rule with a statement of basis and purpose not less than thirty days before its effective date; and (4) grant interested persons the right to petition for the issuance, modification or repeal of a rule. 5 U.S.C. § 553(b)-(e).

The APA contains certain exceptions to the notice and comment requirements of Section 553. Specifically, the Act's requirements do not apply to (1) military or foreign affairs; (2) internal management or propriety affairs; (3) interpretative rules, general statements of policy, or rules of practice and procedure; and (4) situations in which good cause exists for dispensing with notice and comment requirements. 5 U.S.C. § 553(a)(1), (2) and (b)(A). However, the courts have repeatedly recognized that the various exceptions to the notice and

comment requirements of section 553 are to be narrowly construed.

> Congress was alert to the possibility that these exceptions might, if broadly defined and indiscriminately used, defeat the section's purpose. Thus the legislative history of the section is scattered with warnings that various of the exceptions are not to be used to escape the requirements of section 553. *See, e.g.* S.Doc. No. 248, 79th Cong. 2d Sess. 19, 199, 258 (1946). . . . Further, the Senate Committee responsible for considering the APA concluded its report by investing courts with a "duty . . . to prevent avoidance of the requirements of the bill by any manner or form of indirection. . . ." *Supra*, 79th Cong. 2d Sess. 19, at 217. In sum, as this court said in *Humana of South Carolina v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978). "The salutary effect of the Act's public comment procedures cannot be gainsaid, so only reluctantly should courts recognize exemptions therefrom."

American Bus Association v. United States, 627 F.2d 525, 528 (D.C. Cir. 1980). *Accord, National Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377 (2d Cir. 1978); *Housing Authority v. United States Housing Authority*, 468 F.2d 1 (8th Cir. 1972).

It is the view of the Court that the Defendants' reliance upon the foreign policy exception is not well founded. The case law involving foreign policy exceptions is extremely sparse. Research has disclosed no Supreme Court decisions directly on point, nor any from the Fifth or Eleventh Circuits. The meager authority for finding in this area and the courts' narrow view of the APA exceptions are, in and of themselves, reasons for the Court to hesitate to find the exception applies here. Moreover, the cases cited by Defendants, *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980); *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir. 1979) are clearly distinguishable from the case *sub judice*.

Those cases involved challenges to regulations governing the immigration status of Iranian nationals in the United States during the hostage crisis. The "good cause" and foreign policy exceptions to the notice and comment provisions were found to apply because there was no way to predict how the regulations would have affected the "attitude and conduct of the Iranian government." 617 F.2d at 748. Under the circumstances, deference to the Executive's choice of procedures was advisable.[46] But the *Yassini* court emphasized the limited applicability of this exception in a footnote, stating that "[t]he foreign affairs exception would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs. *See Hou Ching Chow v. Attorney General*, 362 F.Supp. 1288 (D.D.C. 1973). For the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences. S.Rep. No. 752, 79th Cong. 1st Sess. 13 (1945). As we discuss, this is the case here." 618 F.2d at 1360 n.4.

Nothing in the record before this Court supports a finding that promulgation of the new parole criteria, under the provisions of 5 U.S.C. § 553, would have resulted in "undesirable international consequences."[47] To the contrary, publication may have enhanced the deterrent effect of the new policy and deterrence is one of the goals the Government sought to attain by initiating the

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[46] It is significant to note that in spite of the unstable situation in Iran, the regulations challenged in *Malek-Markzban v. INS*, 653 F.2d 113, 115 (4th Cir. 1981) were promulgated but not subject to notice and comment. In the case at bar no effort was made to comply with the APA.

[47] Mere promulgation of the detention rules might have been sufficient if it took place, for example, in the midst of another boatlift. But the circumstances under which detention was initiated were not sufficiently of an emergency nature to allow the foreign policy exception to apply.

detention policy. At best, the connection between the detention policy and this country's conduct of foreign affairs is tenuous and certainly not substantial enough to find that it is exempted from the APA's rulemaking procedures under 5 U.S.C. § 553(a)(1).

The APA also exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure or practice" from the notice and comment requirements. 5 U.S.C. § 553(b)(A). Although the Act draws this distinction, it does not define the differences between the categories themselves. The Government contends that the new release criteria constitute an interpretative rule or general statement of policy. The Court, however, must determine the category into which the rule falls. "[T]he label that the particular agency puts upon its given exercise of administrative power is not . . . conclusive; rather it is what the agency does in fact." *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481 (2d Cir. 1972); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416, 62 S.Ct. 1194, 1199, 86 L.Ed. 1563 (1942).

A substantive rule, subject to notice and comment procedures, as opposed to an interpretative rule which is exempt, is a rule made by an agency pursuant to its delegated power to make rules having the force of law if they are constitutional, within the granted power and issued according to proper procedure. K. Davis, Administrative Law Text § 5.03, at 126 (1972). The Attorney General's Manual on the APA defines substantive rules as "rules other than organizational or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute . . . Such rules have the force and effect of law." *Id.* at p. 30 n. 3. Such rules change "existing rights and obligations." *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972); B. Schwartz, *Administrative Law* 154 (1976).

Interpretative rules are "rules or statements issued by an agency to advise the public of the agency's construc-

tion of the statutes and rules which it administers." The Attorney General's Manual at 30 n.3 (1947). Perhaps the most often cited definition of interpretative rules is that provided by the District of Columbia Circuit: "Generally speaking, it seems to be established that 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means." *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979).

A general statement of policy is a statement by an administrative agency announcing motivating factors the agency will consider, or tentative goals toward which it will aim in determining the resolution of a substantive question or regulation.

> A general statement of policy . . . is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, pressages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.

Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974); *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979).

Clearly, the new detention policy is not a general statement of policy that INS hopes to implement in the future. It is being implemented right now! Nor does it set a goal that future proceedings *may* achieve, for the change has been presented as a *fait accompli*. Immediately upon its effective date the former practice of freely paroling Haitians into the community ceased and a new policy paroling only humanitarian cases began. Thus, the new criteria for release is not exempt from APA requirements as a "general statement of policy".

In *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979), the Fifth Circuit stated:

> The proper test to be applied in considering a rule that may arguably fall under the exemptions for "procedural rules" is as stated by *Pharmaceutical Manufacturers Association v. Finch*: "[W]hen a proposed regulation of general applicability has a *substantial impact* on the regulated industry, notice and opportunity for comment should be provided." 307 F.Supp. 858, 863 (D. Del. 1970) (emphasis added). The exemption of section 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated. *See Aiken v. Obledo*, 442 F.Supp. 628, 649-50 (E.D. Cal. 1977). Our inquiry, therefore, is not whether the rule is "substantive" or "procedural", but rather whether the rule will have a "substantial impact" on those regulated.

607 F.2d at 701-02.

Applying this test to the facts of the case at bar leads inescapably to the conclusion that the new detention policy is a substantive rule that is not exempt from the APA's rulemaking requirements. The new release criteria radically depart from the existing practice of regularly releasing Haitian aliens. It makes detention the rule, not the exception; and prescribes very narrow circumstances where parole will be allowed. Upon implementation, the new policy had an immediate and substantial impact on the Plaintiffs. The Court cannot think of any administrative action that would have a greater impact on a regulated group of people that a change in policy which results in their indefinite incarceration where, under the previous policy, they would have been free.[48] It is true

[48] Based on the Court's finding in Section H1, *infra*, any rule or regulation that is promulgated must not be discrminatory on the basis of race or national origin. However, to the extent detention is a function of presentation of a prima facie asylum claim, the Court does not believe that reference to the applicant's national origin would necessarily constitute discrimination.

that the prior policy was never formalized by a written requirement or by its adoption in a formal rulemaking proceeding. It is equally true that under the old policy, Haitians could not claim a substantive right to parole. But a change in a longstanding informal practice is as much a rule as repeal of a formal regulation if the result has a substantial impact on those regulated. *See Pharmaceutical Manufacturers Association v. Finch*, 307 F.Supp. 858 (D. Del. 1970); *National Motor Freight Traffic Association v. United States*, 268 F.Supp. 90 (D.C. 1967), aff'd per curiam, 393 U.S. 18, 89 S.Ct. 49, 21 L.Ed.2d 19 (1968). Here the policy change had a substantial impact, it constitutes a substantive rule and it should have been adopted in accordance with the APA's rulemaking provisions.

H. INVIDIOUS DISCRIMINATION QUESTION

The Court has concluded that the new detention policy was adopted in a procedurally defective manner and that Plaintiffs' continued incarceration pursuant to that policy is unlawful. Technically, the Court need not go further in order to resolve Plaintiffs' other claim for relief.[49] However, considerations of judicial economy and fairness compel the Court to reach the other issue because a failure to do so might require these parties to spend years litigating this case before the Court of Appeals only to have it returned here for findings on issues already tried.

[49] The Court has endeavored to rule on the propriety of Plaintiffs' detention as expeditiously as possible. In order to do so, the Court has not made factual findings or conclusions of law with regard to Plaintiffs' First Amendment claims. Depending on the type of relief awarded Plaintiffs and the speed with which it is implemented, the First Amendment claim may become moot. The Court will make that determination after the June 23, 1982, hearing on relief.

1. THE EQUAL PROTECTION CONCEPT INCORPORATED IN THE FIFTH AMENDMENT

The Supreme Court has held that, under the Constitution, aliens seeking to enter the United States "may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by its sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall provide." *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). Congress has plenary power to decide *which aliens* shall be allowed to enter and *what procedure* shall be used to determine their admissibility. "Whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned." 338 U.S. at 543, 70 S.Ct. at 312, citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 12 S.Ct 336, 35 L.Ed. 1146 (1892); *Ludecke v. Watkins*, 335 U.S. 160, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948).

If an alien seeking admission could challenge the constitutionality of Congress' decision whether and how to admit him the sovereign's power to control its borders would be compromised. Accordingly the Supreme Court has said "the Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Kwong Hai Chew v. Colding*, 334 U.S. 590, 596 n.5, 73 S.Ct. 472, 477 n.5, 97 L.Ed. 576 (1953). But the Court has never held, as Defendants contend, "the Constitutional guarantees of the Fifth Amendment do not extend to unadmitted aliens."

Plaintiffs are excludable aliens. The ultimate goal appears to be admission to the United States. However, their claim before this Court does not relate to admission and does not challenge Congress' power in that regard. Plaintiffs' claim is that they cannot be denied parole, pending a determination of their admissibility, because of their race and/or national origin.

Parole by definition "shall not be regarded as an admission of the alien . . ." 8 U.S.C. 1182(d)(5). The

parole sought by Plaintiffs consist of temporary release into the community while their political asylum claims are being prepared and processed; a process than can take years, if appealed. Parole, in this sense, is equivalent to pre-trial bond for a criminal defendant. In both cases, the primary considerations are protection of the community and ensuring that the individual appears for trial. When requesting release on parole, Plaintiffs are entitled to the same constitutional protections afforded all persons within the territorial jurisdiction of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896); *Doe v. Plyler*, 628 F.2d 448, 454 (5th Cir. 1980), *app. pending*, 50 U.S.L.W. 3462; *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981). Plaintiffs may not be deprived of their liberty without due process of law and cannot be denied parole solely because of their race and/or national origin.

It is important to note that the actions challenged herein are *not* Congressional. Plaintiffs allege the Defendants are applying a neutral statute in a discriminatory fashion. This distinction, between legislation and enforcement, is critical. *Congress* can legitimately make distinctions among and against aliens that would be unacceptable if applied to citizens, *Mathews v. Diaz*, 426 U.S. 67, 80, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976), but "[i]n the *enforcement of these policies*, the Executive Branch of the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 530, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (Frankfurter, J.), cited in, *Fiallo v. Bell*, 430 U.S. 787, 792 n.4, 97 S.Ct. 1473, 1478, n.4, 52 L.Ed.2d 50 (1977). (Emphasis added). "A statute, otherwise neutral in its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 [6 S.Ct. 1064, 1070, 30 L.Ed. 220] (1886)." *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976).

2. PROOF OF DISCRIMINATION UNDER THE FIFTH AMENDMENT

While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954); *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964); *United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982). The "[E]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 23, 96 S.Ct. 612, 636, 46 L.Ed.2d 659 (1976); *United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982). Thus, the analysis in cases involving claims of discrimination of federal officers in violation of the Fifth Amendment parallels the equal protection doctrine under the Fourteenth Amendment.

The type and level of proof required to establish a *prima facie* case of discrimination on the basis of national origin is essentially the same as that required in cases of racial discrimination. *See e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), cited in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1976); *Castenada v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1976). In order to establish a claim of discrimination under the Equal Protection clause, Plaintiff must show the Defendant intentionally or purposefully discriminated against him. 429 U.S. at 265, 97 S.Ct. at 563; *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 205, 93 S.Ct. 2686, 2696, 37 L.Ed.2d 548 (1973); *Wright v. Rockefeller*, 376 U.S. 52, 56-57, 84 S.Ct. 603, 605-06, 11 L.Ed.2d 512 (1964); *Akins v. Texas*, 325 U.S. 398, 403-404, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945). A plaintiff need not prove that a discriminatory purpose was the sole, dominant or even primary

purpose in the challenged action, but must show it has been "a motivating factor in the decision." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265-66, 97 S.Ct, 555, 564, 50 L.Ed.2d 450 (1977). The plaintiff need only show that the challenged decision was "in part" the result of a discriminatory purpose. *City of Mobile v. Bolden*, 446 U.S. 55 at 72 n.17, 100 S.Ct. 1490, 1502 n.17, 64 L.Ed.2d 47 (1980); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). No particular degree of discriminatory intent need be shown, only its existence.

The Supreme Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), outlined the factors a Court should consider in a case of alleged discrimination.

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another." *Washington v. Davis, supra*, [426 U.S. 229] at 242 [96 S.Ct. 2040 at 2049, 48 L.Ed.2d 597]—may provide an important starting point.
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> Sometimes a clear pattern unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*, 118 U.S. 356 [6 S.Ct. 1064, 30 L.Ed. 220] (1886); *Guinn v. United States*, 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340] (1915); *Lane v. Wilson*, 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281] (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 [81 S.C. 125, 5 L.Ed.2d 110] (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone

is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. *See Lane v. Wilson, supra; Griffin v. School Board*, 377 U.S. 218 [84 S.Ct. 1226, 12 L.Ed.2d 256] (1964); *Davis v. Schnell*, 81 F.Supp. 872 (SD Ala), *aff'd per curiam*, 336 U.S. 933 [69 S.Ct. 749, 93 L.Ed. 1093] (1949); cf. *Keyes v. School Dist. No. 1, Denver, Colo., supra*, [413 U.S. 189] at 207 [93 S.Ct. 2686 at 2697, 37 L.Ed.2d 548]. The specific sequence of events leading up to the challenged decision also may shed some light on the decision maker's purposes. *Reitman v. Mulkey*, 387 U.S. 369, 373-376 [87 S.Ct. 1627, 1629-1631, 18 L.Ed.2d 830] (1967); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 [56 S.Ct. 444, 449, 80 L.Ed. 660] (1936). Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached. The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. *See Tenney v. Brandhove*, 341 U.S. 367 [71 S.Ct. 783, 95 L.Ed. 1019] (1951); *United States v. Nixon*, 418 U.S. 683, 705 [94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039] (1974); 8 J. Wigmore, Evidence § 2371 (McNaughton rev. ed. 1961).

429 U.S. at 267-268, 97 S.Ct. at 564-65.

Other factors which courts may consider in determining the existence of discriminatory purpose are: the foreseeability of discriminatory impact, *Columbus Board of Education v. Penick*, 443 U.S. 449, 464-65, 99 S.Ct. 2941, 2949-50, 61 L.Ed.2d 666 (1979); knowledge of discriminatory impact, *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1050 (6th Cir. 1977); absence of any valid interest being served, *United States v. Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977) (Austin III), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979); and the availability of less discriminatory alternatives, *United States v. Board of School Commissioners of Indianapolis*, 573 F.2d 400, 413 (7th Cir. 1978). With these factors in mind, the Court will now proceed to address the case before it.

3. DISPROPORTIONATE IMPACT

It is undisputed that Haitians are impacted to a greater degree by the new detention policy than aliens of any other nationality at the present time. The question is whether this fact is unexplainable on grounds other than race and/or national origin. The evidence shows that a major reason for the continued incarceration of Haitians is the injunction that prevents the holding of exclusion hearings *only* for Haitians. The injunction was entered at the behest of Plaintiffs' counsel herein prior to assignment of this case to the undersigned Judge.

Another reason is the State Department's position, be it right or wrong, that a prima facie case of aslyum is not established solely by virtue of the fact that a Haitian national has left his homeland. Without the opportunity to present further evidence that there is a well-founded fear of persecution upon return to Haiti, the individual Plaintiffs herein cannot establish a prima facie case of asylum thereby entitling them to release on parole. Finally, there is some evidence in the record that aliens of other nationalities, particularly Mexicans, when faced

with the choice of staying in detention or voluntarily departing the country, choose the latter alternative.

On the other hand, Haitians cannot voluntarily withdraw their applications for admission without Court approval and, therefore, release of Haitians who desire to voluntarily depart is significantly delayed. All of these factors combined result in the situation that exists today and the consequential appearance of a disproportionate impact on Haitians.

4. HISTORICAL BACKGROUND

Throughout the trial of this cause, Plaintiffs have emphasized Judge King's finding in *Haitian Refugee Center, Inc. v. Civiletti*, 503 F.Supp. 442 (S.D. Fla. 1980), that INS discriminated against Haitian nationals when their asylum claims were denied *en masse*.[50] Plaintiffs believe, and would like this Court to conclude, that the practices challenged herein are a mere continuation of the prior INS policy against excludable instead of deportable Haitians. The Court finds, however, that Plaintiffs' contentions in this regard are simply without merit.

The policies and practices challenged herein, including detention, were proposed to and approved by the President of the United States in the context of developing

[50] The Eleventh Circuit's opinion in *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 (11th Cir. 1982) was issued subsequent to this Court's decision in the case at bar but prior to issuance of this opinion. The Court believes that the Eleventh Circuit's analysis of the due process issue is substantially consistent with the reasoning herein. *See* note 54, *infra*.

More importantly, the Court believes that it is significant to note that the Eleventh Circuit's opinion specifically refrained from affirming that part of the district court's opinion which held the Haitians were victims of unlawful discrimination on the basis of national origin. *See Id.* at 1032. This Court believes that the Eleventh Circuit's action in this regard substantially reduced the precedential value and weight to be given to the finding of discrimination. Plaintiffs' argument that INS has a history of discrimination against Haitians was treated accordingly.

a comprehensive new immigration policy. A change in policy was needed because the old one was not working. This fact was demonstrated by the increased flow of Haitians to South Florida during the years 1977 to 1980 and by the massive influx of Cubans during the boatlift in 1980. After making the decision to grant these and other illegal aliens amnesty, measures had to be taken to ensure that another crisis, requiring another mass amnesty, did not develop. These measures were intended to be applied to all aliens regardless of their race or national origin.

5. DEPARTURE FROM THE NORMAL PROCEDURES

The change in our immigration policy was accompanied by radical departures from the prior procedures in exclusion proceedings. Plaintiffs were subjected to these new procedures but they were not alone. The Court intimates no view on whether these practices in and of themselves constitute a denial of due process but it firmly believes that the manner in which they were applied did not violate Plaintiffs' right to equal protection of the law.[51]

6. INTENT

Determining whether an invidious discriminatory purpose was a motivating factor in Defendants' actions is not an easy task. Such a determination is substantially more difficult to make where, as here, there is no direct evidence of intent to discriminate and the Court is left to decide whether a preponderance of the circumstantial evidence proves intent.

This Court has been struggling with that decision for five weeks. It has examined the exhibits and testimony and has pondered the reasonable inferences that can be

[51] The Court is specifically referring to immediate service of the I-122, interviews with the aliens prior to their exclusion hearing without counsel being present and mass exclusion hearings.

drawn therefrom. Having reviewed the record in this cause and being otherwise duly advised, it is the view of the Court that the historical background, the departures from the prior procedures and the apparent disproportionate impact of the detention policy on Haitians do not establish by a preponderance of the evidence that the Defendants intended to discriminate against Plaintiffs because of their race and/or national origin.[52] "The fairness of a law [or policy] does not consist of its effect being actually felt by all alike but in its having been laid down for all alike."[53] The Court is convinced that De-

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[52] While the Court finds that the detention policy does not violate Plaintiffs' right to equal protection because it was not motivated by any discriminatory purpose, it finds that to the extent the policy withdrew discretion from the District Director to grant deferred inspections to undocumented Haitians arriving aboard nonsignatory carriers, it violates due process. *See Petition of Cahill*, 447 F.2d 1343 (2d Cir. 1971). Thus any rule or regulation promulgated pursuant to this opinion must preserve the District Director's power in this regard unless the regulations are amended. *See* 8 C.F.R. § 212.5.

[53] Seneca, *Letters to Lucilius*, 107.

Based on the Court's factual finding that Defendants did not discriminate against Plaintiffs within the meaning of the Fifth Amendment, the Court finds Plaintiffs' claims pursuant to Article 3 of the Protocol to be without merit. Similarly, with regard to Plaintiffs' claims under Article 31, the Court finds that they too lack merit. Plaintiffs' detention was not in violation of Section 1 because it was not intended to be a penalty. Detention was imposed as a part of the administrative process pending resolution of Plaintiffs' claims for asylum. To the extent detention was used for its deterrent effect the Court does not believe that its function in this regard should be equated to punishment. Detention was never imposed as a criminal sanction for the means by which Plaintiffs entered this country and is therefore not within Section 1 of Article 31. Moreover, to the extent that it was necessary for efficient administrative processing of Plaintiffs' claims for admission, the detention did not violate Section 2 of Article 31.

Finally, the Court believes that to the extent detention is authorized by statute that the protocol does not give Plaintiffs an inde-

fendants intended to be fair and that if another class of aliens arrived in this country in a situation similar to that of the Plaintiffs they would be treated in a similar fashion.[54]

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pendent cause of action for release. The history of adoption of the protocol makes clear that all the individuals involved in adopting it did so with the belief that it would not alter or enlarge the effect of the existing immigration laws. *Ming v. Marks*, 367 F.Supp. 673 (S.D.N.Y. 1973), *aff'd* 505 F.2d 1170 (2d Cir. 1974).

[54] Subsequent to the drafting of the equal protection portion of this Court's opinion, two significant appellant court rulings in this area have been issued. The first decision rendered by the Eleventh Circuit Court of Appeals held that "the executive is subject to the constraints of due process in implementing and enforcing congressional immigration policy." *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023 at 1037 (11th Cir. 1982).

The second opinion rendered by the United States Supreme Court just this Tuesday, June 15, 1982 held:

> *Whatever his status under the immigration laws*, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments. *Shaughnessy v. Mezei*, 345 U.S. 206, 212 [73 S.Ct. 625, 629, 97 L.Ed. 956] (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 [16 S.Ct. 977, 981, 41 L.Ed. 140] (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 [6 S.Ct. 1064, 1070, 30 L.Ed. 220] (1886). Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government. (Emphasis supplied)

Plyler v. Doe, —— U.S. ——, ——, 102 S.Ct. 2382 at 2391, 72 L.Ed.2d 786 (1982) *citing Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976).

While neither of these opinions squarely address the question of the constitutional protections afforded unadmitted aliens present within the territorial jurisdiction of the United States, they lend support to this Court's conclusion that such aliens are entitled to the protections afforded all persons by the Fifth Amendment provided they are not seeking to invalidate Congressional actions relating to their admission. In other words, the Executive is constrained by

I. CONCLUSION

The worst that can be said of the manner in which INS implemented its new immigration policy is that it was not well planned or executed and consequently it sometimes appeared to be arbitrary or inconsistent. The appearance and allegations of discrimination in the case at bar could have been avoided by promulgation of the new detention rule pursuant to the APA. The APA's notice and comment requirements are not merely technical; rather they are significant requirements designed to assure the quality and responsiveness of agency policy-making:

> Section 553 was one of Congress' most effective and enduring solutions to the central dilemma it encountered in writing the APA—reconciling the agencies' need to perform effectively with the necessity that "the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure." S. Doc. No. 248, 79th Cong. 2d Sess. 244 (1946), *quoting* H.R. Rep. No. 1149, 76th Cong., 1st Sess. 2 (1939). The "principal purpose" of section 553 was "to provide that the legislative functions of administrative agencies shall as far as possible be exercised only upon public participation on notice . . . ." *Id.* at 257. Congress thus selected public participation in rulemaking as its means of assuring that an agencies' decisions are both informed and responsive. As we have said before, "if the agency in carrying out its 'essentially legislative task', has infused the

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the limits of due process when dealing with unadmitted aliens physically present in the United States.

The Court feels these two recent appellate decisions are a natural extension of the prior law regarding the Fifth and Fourteenth Amendment protections due aliens. Although this Court has made the next logical step in this progression, Plaintiffs were unable to establish that Defendants violated the Constitutional guarantees afforded them.

> administrative process with a degree of openness, explanation and participatory democracy required by the APA, it will thereby have 'negate[d] the dangers of arbitrariness and irrationality in the formulation of rules . . .' "

American Bus Association v. United States, 627 F.2d 525, 528 (D.C. Cir. 1980). The notice and comment provisions "were designed to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.E.2d 709 (1969). These provisions afford an opportunity for "the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 744 (3rd Cir. 1969).

These policy reasons for the rulemaking procedure apply with equal force in the field of immigration. It matters not that those regulated are outside the country and cannot reasonably be expected to receive notice and to participate in rulemaking proceedings. That function is performed by the watchdogs of the rights of the regulated.

> Congress realized that an agency's judgment would only be as good as the information upon which it drew. It prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested—and perhaps best informed—on the subject of the rulemaking at hand. *See Shell Oil v. FEA*, 574 F.2d 512, 516 (Em. App. 1978).

Defendants' unilateral formulation and implementation of the new detention policy was contrary to the letter and spirit of the APA. Plaintiffs' reaction to INS' continued enforcement of that policy was not motivated by any desire to circumvent the law. Rather, Plaintiffs'

actions were designed to ensure that the Government follows the procedural safeguards that Congress established to protect *all* persons from arbitrary Government action.

> A law is imposed on others by way of a rule and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Therefore, in order that a law obtain the binding force which is proper to a law, it must be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Therefore promulgation is necessary for the law to obtain its force. Thus . . . the definition of law may be gathered; and it is nothing other than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.
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> Aquinas, *Summa Theologica*, I-II, 90, 4

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiffs have established that the new detention policy, whereby excludable aliens are placed in detention until they establish to INS' satisfaction a prima facie claim for admission, was not adopted in accordance with the requirements of the Administrative Procedure Act. Because Defendants failed to give interested persons notice and an opportunity to comment on the new detention policy and thereafter to promulgate that policy in the Federal Register 30 days prior to its implementation, the Court finds the rule pursuant to which Plaintiffs are incarcerated to be null and void.[55]

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[55] 5 U.S.C. § 552(a); 5 U.S.C. § 552(a)(1)(D); 5 U.S.C. § 553. *Parco v. Morris*, 426 F.Supp.

By its ruling, the Court does not mean to say that detention in itself is unlawful. That question must be left to another day. The Court holds that when the Government changed its long-standing policy of freely paroling Haitians to a policy of incarcerating them while they litigate their claims for admission to this country, it did so in a procedurally improper way. Those procedures are designed to protect all persons, aliens and citizens alike. Unless and until INS adopts a detention rule or regulation as required by law, this Court will not sanction enforcement of their new detention policy. Accordingly, the Court finds in favor of the Plaintiffs on their Administrative Procedure Act claim as set forth in Count II of the Complaint.

2. Plaintiffs have failed to prove by a preponderance of the evidence that they were incarcerated because of their race and/or national origin. The evidence shows that the detention policy was not directed at Plaintiffs because they were black and/or Haitian, but because they were excludable aliens unable to establish a prima facie claim for admission and that non-Haitians were detained pursuant to this policy as well. The mere fact that more Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminatory. Regardless of its ultimate impact, the policy was intended to be applied and was in fact applied equally to all similarly situated aliens regardless of their race and/or national origin. Accordingly, the Court finds in favor of the Defendants as to Count VII of the Complaint.

3. The parties are hereby directed to appear at a hearing that is set to commence at 2:00 o'clock p.m. on Wednesday, June 23, 1982 for the purpose of determining the effect of this Court's ruling, the remedy to be afforded Plaintiffs, how that remedy is to be effected and the extent to which this Court should retain jurisdiction over this cause. The Court invites participation at

said hearing of all other interested parties including but not limited to the State of Florida, Metropolitan Dade County, the Dade County Bar Association, the Florida Bar, the American Bar Association and other organizations that might assist in implementing any proposed plan arising out of said hearing. It is the Court's intent to utilize the assistance of the Committee heretofore appointed by this Court and their attendance is likewise requested.

UNITED STATES DISTRICT COURT
S. D. FLORIDA

No. 81-1260-CIV-EPS

LUCIEN LOUIS, ET AL., PLAINTIFFS

v.

ALAN C. NELSON, ET AL., DEFENDANTS

June 29, 1982

FINAL JUDGMENT [1]

SPELLMAN, District Judge.

The above-styled cause is a class action brought to challenge the Defendants' policy of detaining Haitian nationals pending resolution of their claims for admission to the United States.[2] The Plaintiffs herein are the

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[1] This Final Judgment is being entered pursuant to the provisions of Federal Rules of Civil Procedure 23(c)(3), 54 and 58.

[2] The complaint in this cause originally contained seven counts challenging a wide variety of policies and practices used by INS during exclusion proceedings. In a prior order of this Court, four entire counts and portions of two others were dismissed. *See Louis v. Meissner*, 532 F.Supp. 881 (S.D. Fla. 1982).

Two issues set forth in three counts survived the Court's Order of Dismissal. The first issue, and a question of primary importance to these Plaintiffs, is whether they are lawfully being detained pending the outcome of their exclusion proceedings. As will be more fully explained *infra*, the Court has found in favor of the Plaintiffs on this issue based on their APA claim (Count II) and

Haitian Refugee Center, Inc., Lucien Louis, Wilner Luberisse, Jean Louis Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard, Joel Casimir, Job Dessin and Prophete Talleyvand, on behalf of themselves and all others similarly situated. The class certified by the Court consists of:

> All Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and also are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either:
>
> 1. Unrepresented by counsel; or
>
> 2. Represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.[3]

On June 18, 1982, the Court issued an opinion 544 F.Supp. 973 in this case that found as follows:

> 1. Plaintiffs have established that the new detention policy, whereby excludable aliens are placed in detention until they establish to INS' satisfaction a prima facie claim for admission, was not adopted in accordance with the requirements of the Administrative Procedure Act. Because Defendants failed to give interested persons notice and an opportunity to comment on the new detention policy in the Federal Register 30 days prior to its implementation,

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in favor of the Defendants on the discrimination claim (Count VII). In light of the relief to be afforded Plaintiffs by this Final Judgment, the Court believes that Plaintiffs' claim of a right of access, as set forth in Count IV of the Complaint, is moot.

[3] See Paragraph 6 *infra*. The modification granted therein is without prejudice to the right of the Government to object to further class modifications or motions for intervention.

> the Court finds the rule pursuant to which Plaintiffs are incarcerated to be null and void.
>
> By its ruling, the Court does not mean to say that detention in itself is unlawful. That question must be left to another day. The Court holds that when the Government changed its long-standing policy of freely paroling Haitians to a policy of incarcerating them while they litigate their claims for admission to this country, it did so in a procedurally improper way. Those procedures are designed to protect all persons, aliens and citizens alike. Unless and until INS adopts a detention rule or regulation as required by law, this Court will not sanction enforcement of their new detention policy. Accordingly, the Court finds in favor of the Plaintiffs on their Administrative Procedure Act claim as set forth in Count II of the Complaint.
>
> 2. Plaintiffs have failed to prove by a preponderance of the evidence that they were incarcerated because of their race and/or national origin. The evidence shows that the detention policy was not directed at Plaintiffs because they were black and/or Haitian, but because they were excludable aliens unable to establish a prima facie claim for admission and that non-Haitians were detained pursuant to the policy as well. The mere fact that more Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminatory. Regardless of its ultimate impact, the policy was intended to be applied and was in fact applied equally to all similarly situated aliens regardless of their race and/or national origin. Accordingly, the Court finds in favor of the Defendants as to Count VII of the Complaint.

Based on this ruling, the Court set a hearing for June 23, 1982 to determine "the effect of this Court's ruling,

the remedy to be afforded Plaintiffs, how that remedy should be effected and the extent to which this Court should retain jurisdiction over the cause."

The Court has found that the detention policy pursuant to which Plaintiffs are incarcerated was adopted and implemented "without observance of the procedures required by law." Therefore, the new detention policy is null and void and the policy regarding parole, that was used prior to May 20, 1981, is in full force and effect. *See* 5 U.S.C. §§ 552, 553, and 706; *Kelly v. United States*, 339 F.Supp. 1095, 1101 (E.D. Cal. 1972); *Lewis v. Weinberger*, 415 F.Supp. 652 (D.N.M. 1972); *Hou Ching Chow v. Attorney General*, 362 F.Supp. 1288 (D.C.D.C. 1973); *Parco v. Morris*, 426 F.Supp. 976 (E.D. Pa. 1977); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2nd Cir. 1972).

The Court does not believe that allowing these Plaintiffs to remain in detention while a rulemaking proceeding takes place is a viable solution to this lawsuit. Some of the Plaintiffs herein have been incarcerated for over one year pursuant to a policy this Court has found to be unlawful. Nothing in the record indicates that these individuals fall within the old detention policy because they are likely to abscond or a security risk. It would not be just or equitable to require detention of the members of this class in the future nor would an unconditional release be appropriate under the circumstances. Therefore, the Court believes that the remedy that best serves the interests of all parties to this litigation is an interim plan for release of these Plaintiffs on parole subject to the conditions set forth herein pending a determination of their claims for admission.

It is therefore,

ORDERED AND ADJUDGED as follows:

1. FINAL JUDGMENT is entered in favor of the Defendants as to Count VII of the Complaint.

2. FINAL JUDGMENT is entered in favor of the Plaintiffs as to Count II of the Complaint.

3. Based on the power vested in this Court pursuant to 28 U.S.C. § 2202,[4] the Defendants herein, their heirs, successors, assignees, agents and employees are hereby ENJOINED from enforcing their policy of detaining excludable aliens unless they establish to INS' satisfaction a prima facie claim for admission until that policy is embodied in a rule and adopted in accordance with 5 U.S.C. §§ 552 and 553 and any other relevant provision of law. However, this injunction shall not be construed to preclude detention of excludable aliens deemed a security risk or likely to abscond.

4. Based on the power vested in this Court pursuant to 28 U.S.C. §§ 2202 and 2241, the Defendants herein, their heirs, successors, assignees, agents and employees are hereby ENJOINED from continuing to detain the Plaintiffs herein and are ORDERED to release said individuals.

5. The implementation of Paragraph 4 of this Final Judgment is to be commenced forthwith in accordance with the terms and conditions hereinafter set forth:

A. The Immigration and Naturalization Service is to obtain full identification information relative to each member of the class including but not limited to photographs, fingerprints and a full and complete personal history for future and continued identification of said individuals. This record is to be kept by the Service in duplicate form and to be utilized by them in the location that the alien is ultimately resettled. INS shall also maintain a master file of these records in their offices in Miami, Florida. Said central file is to be kept separate and apart

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[4] *United States Lines Co. v. Shaughnessy*, 195 F.2d 385 (2nd Cir. 1952), citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951); *Powell v. McCormick*, 395 U.S. 486, 499, 89 S.Ct. 1944, 1952, 23 L.Ed.2d 491 (1969).

from other records for easy future identification and use. These records shall contain continual updating of the original location of said individual and any notice of a change relative to address and employment.

B. Each Haitian is to receive a typed immigration form I-94 with alien number, an indication of parole pursuant to Section 212(D)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(D)(5), and with "employment authorized" stamped on said form. A duplicate of said I-94 shall be kept in the central file located here in Miami, Florida in addition to being kept in the alien's file.

C. The release of the members of the class will be completed regardless of whether counsel has been secured or otherwise provided for said individuals at the time of their release.

D. The members of the class are to be released to INS approved sponsors throughout the United States upon presentation to INS of responsible sponsors who are willing and agreeable to accepting the terms and conditions of this Order as the same apply to them. Responsible sponsors shall always include volunteer agencies and may include extended family members (residents in a de facto sense who can satisfy the Service relative to their permanent and definable addresses) or other suitable parties approved by the volunteer agencies. There must be *both* a volunteer agency and an individual sponsor as to each alien. It is not the intent of this Court by this Order that the Service will deviate from the policy which precludes the release of individuals who have serious, contagious diseases or who have been medically declared to be mentally psychotic and a danger to themselves or the community. Financial assistance to defray medical and psychiatric expenses and to assist those Plaintiffs who are now and remain in the future financially indigent is a concern that must be continued to be addressed. Numerous voluntary agencies have indicated their willingness in this regard. It is not the Court's intent that this

financial obligation be the continued concern of the State or the community in which the individual is located.

E. As a condition to approval as a sponsor, each voluntary agency and individual sponsors as contemplated by this Order will agree in writing to abide by the terms of this Order including a full reporting procedure on a weekly basis to independent third parties approved and appointed by this Court. The Defendants within ten (10) days from the entry of this Order are to provide arrangements for financial funding to defray the expense and functioning of said independent third parties. The independent third parties appointed by this Court are to immediately communicate to the appropriate INS representative the failure of any sponsor to report or any negative reports relative to individual Haitians, that is to say, an indication from the sponsor that the Haitian failed to contact him. The reporting conditions, requirements and responsibilities set forth in this Paragraph are pursuant to and under the authority of the United States District Court.

F. This Court's predecessor issued an injunction enjoining exclusionary hearings from going forward as to all Haitians in detention who were unrepresented by counsel. Subsequent to this Court's opinion of June 18, 1982, the Defendants moved to dissolve that injunction. This Court does herewith specifically reserve ruling on said motion at this time in accordance with the following terms and conditions:

(1) Hearings are to begin as soon as possible for all members of the class who are represented by counsel whether they be privately retained or pro bono.

(2) At or before the time of release, each member of the class together with the voluntary agency and individual sponsor are to be served with notice of the first appearance before an Immigration Judge which appearance is to be not less than thirty (30) days after the date of release. At the time of said first appearance, if said individual has either privately retained counsel or ac-

cepted pro bono representation, the individual, together with the voluntary agency and individual sponsor and counsel who at that time will be required to file a G-28 form, will be notified and the matter will proceed thereafter in accordance with law.

(3) If the individual has neither secured counsel or in lieu thereof has pro bono counsel assigned to him at the time of his first appearance, said matter shall be reset for his second appearance not less than thirty (30) days thereafter.

(4) At the second appearance if private counsel has been retained, said cause shall proceed as contemplated in the preceding paragraph. In the event the individual has not secured private counsel, pro bono counsel will be assigned to represent said individual provided, however, that if said individual with a full understanding of his right to have said pro bono counsel assigned to him declines said representation, said refusal to accept such pro bono representation shall serve as good cause for said hearing, as it pertains to said individual, proceeding in accordance with law.

(5) It is the intent of this Order that each individual has the right, after being fully advised of his right to secure private counsel or have assigned pro bono representation, to freely and voluntarily waive said rights provided that the same is done under oath before the Immigration Judge and that said individual is informed of and determined that he understands his rights to privately retained counsel or have pro bono counsel assigned to represent him and said Immigration Judge should further determine that any decision to give up such right is voluntary and not the result of any force, threats or promises. It is further understood that if the individual member of the class appears at the first appearance without counsel and does not knowingly, intelligently and voluntarily waive his right to counsel, that he will be entitled to the continuance of not less than thirty (30) days contemplated for the second appearance.

The Court is specifically continuing to reserve on the Government's motion to vacate the injunction relative to the proceeding of exclusionary hearings regardless of representation of counsel as a direct result of the appearance before this Court of representatives of the American Bar Association, the national and local chapters of the American Immigration Lawyers' Association, the Lawyers' Committee for International Human Rights and the Dade County Bar Association. It is the view of this Court that based on the specific representations made by these organizations and on the additional representations of several of the voluntary agencies that likewise appeared before this Court indicating their ability to obtain attorneys for unrepresented Haitians, that the effort to secure pro bono representation for all of the individual members of the class desiring the same should be attempted. It is the further view of the Court that the representation of Plaintiffs' counsel to this Court of assisting in coordination of this effort should be honored by this Court in the hope of its ultimate success.[5] It is the intent of this Court, therefore, that the injunction heretofore issued by the predecessor Judge will remain in effect regardless of whether or not Plaintiffs are in detention until ninety (90) days after the entry of this Final Judgment at which time the same will be dissolved.

G. Release of the individual members of this class is ORDERED for the full period of legal process and that entry of an order of exclusion in and of itself will not be a ground to revoke said parole. An inexcusable failure to personally appear for proceedings before the Immigration and Naturalization Service or any other proceeding

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[5] Private or pro bono counsel accepting responsibility of representing class members must do so with the understanding and realization that by undertaking that responsibility they are impliedly representing that they are capable of presenting the alien's claim for admission within a reasonable period of time as contemplated by this Order.

in which the attendance of the individual is required or an inexcusable failure to report on a weekly basis resulting in a negative report to INS as set forth above, will be grounds for parole revocation. All other grounds heretofore existing under existing law will likewise serve as a ground for parole revocation.[6]

H. The voluntary agencies participating in this program will, to the extent possible, locate members outside of Dade County and the State of Florida while taking into consideration the Dade County pro bono program, the availability of other counsel and individual sponsors related to said aliens.

6. The motion of the Haitian Refugee Center, Inc. to enlarge the class to include all Haitians in detention for whom a G-28 has been filed on behalf of said Plaintiffs be and the same is hereby GRANTED with the understanding and representation of counsel for the Plaintiffs that privately retained or pro bono counsel will be secured so as to afford fair representation of said individuals to be heard within the reasonable period contemplated by this Order, said individuals be and they are hereby included within said class and are bound by the full effects of this Court's opinion of June 18, 1982 and the provisions of this Final Judgment.

7. That this Court does herewith vacate any interlocutory orders entered by this Court or by the predecessor Judge and does herewith specifically relinquish jurisdic-

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[6] This Order shall not be construed to remove from the District Director the power granted to him by the regulations to, in his discretion, revoke the parole of any of the Plaintiffs herein. Hopefully, the District Director's power in this regard will be sparingly, judiciously and reasonably exercised. To the extent it is so exercised, the Court retains jurisdiction to review said revocation with regard to these class members and, if necessary, to appoint Special Masters in various locations throughout the United States to conduct such a review based on fact finding authority and to report to the Court.

tion over the members of said class to the extent that the same is not hereafter specifically retained by this Court.[7]

8. That this Court does herewith specifically retain jurisdiction over the parties and the subject matter on (a) Defendants' motion to vacate this Court's Order enjoining the exclusionary hearings relative to members of the class who are not represented by either private or pro bono counsel; (b) this Court's Order of February 8, 1982 as the same pertains to the pro bono program of the Dade County Bar Association; (c) Plaintiffs' motion ordering the granting of relief to individual members of the class who have heretofore escaped from detention to be entitled to the benefits of this Court's opinion of June 18, 1982 and this Court's Final Judgment; (d) enforcement of the terms and conditions of this Final Judgment; and (e) the Plaintiffs' motion for award of attorneys' fees and all costs with the understanding that this retention of jurisdiction as to that issue is not a determination of the merits of the entitlement of the Plaintiffs to either attorneys' fees or costs.[8, 9]

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[7] By this ruling, the Court intends to relieve itself of jurisdiction over all exclusion hearings involving class members that go forward outside of this District. The individual aliens should seek such administrative or judicial relief as is available to them by statute in the appropriate INS office or federal district court. It is not the Court's intent to vacate any Orders heretofore entered either granting or denying motions to dismiss.

[8] As to the members of the class in detention as of the date of this Order, it is ordered that their parole status will be governed by this Final judgment and not by any subsequent rule hereafter adopted.

[9] To the extent that this Court does herewith reserve jurisdiction on the ore tenus motions for reconsideration of this Court's Order of Dismissal and for motions to amend the class to include individuals heretofore represented by counsel, this is a partial Final Judgment, said issues to be dealt with by a supplemental order and to the extent that paragraphs 7 and 8 hereof require the same, the Court does in fact

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-CIV-EPS

LUCIEN LOUIS, ET AL., PLAINTIFFS

vs.

ALAN NELSON, ET AL., DEFENDANTS

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND GRANTING PLAINTIFFS' MOTION FOR CLASS MODIFICATION

This cause came before the Court on Plaintiffs' motions for class modification and for reconsideration of this Court's Order granting in part and denying in part Defendants' motion to dismiss. Having reviewed the record in this cause and being otherwise duly advised, it is hereby,

ORDERED AND ADJUDGED as follows:

Plaintiffs' motion for reconsideration of this Court's Order of dismissal is DENIED. It is the view of the Court that the Eleventh Circuit's ruling in *Haitian Refugee Center, Inc. v. Smith*, No. 80-5683 (11th Cir. May 24, 1982) does not require reconsideration of this Court's dismissal of Counts I and VI of the complaint herein. *See Louis v. Meissner*, 532 F.Supp. 881 (S.D. Fla. 1982). The Court of Appeal's ruling makes it clear that the decision to require a party to exhaust his administrative remedies is a matter committed to the sound discretion of the trial court. *Haitian Refugee Center, Inc. v. Smith*, *supra*, slip op. at 15187, citing *NLRB v. Industrial Union*

of Marine and Shipbuilding Workers, 391 U.S. 418, 419, 426 n.8 (1968); *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 865-66 (5th Cir. 1975). In this Court's order of dismissal, the decision was made to require exhaustion first, because Congress intended to make exhaustion a prerequisite to judicial review of determinations made during and incident to exclusion proceedings and second because the Court wanted to give INS the opportunity to correct its own alleged mistakes during the administrative appeals process. The Eleventh Circuit's ruling does not change the Court's view in this regard, rather, it suggests that the ruling was proper. The Court went to great pains to emphasize that the type of review and relief afforded the plaintiffs therein were due to the "factual uniqueness" of the case. Those facts do not exist in the case *sub judice*. For the reasons set forth fully in this Court's Order of dismissal as well as for the reasons above, the Court hereby DENIES Plaintiffs' motion for reconsideration of the dismissal of Counts I and VI.

Plaintiffs' motion to amend the class pursuant to Federal Rule of Civil Procedure 23(d) is GRANTED and the class is hereby modified to include all individuals who would be within the class as defined but for the fact that they are represented by counsel. The Court is granting this motion based on the representation by the Defendants that they would have no objection thereto provided said individuals terminate forthwith any pending litigation regarding the propriety of their detention and the Court makes said termination a requirement of inclusion in the class as modified. In addition, the Court hereby directs the Plaintiffs herein to provide notice of this modification to those individuals not previously members of this class, and to provide them with a copy of this Order and the Court's Final Judgment herein. Said individuals will have twenty (20) days from the date of this Order in which to notify the Court of their intention to opt out of this action or they will be deemed members of the

class herein and subject to all the requirements thereof. This class modification expressly exempts from its purview those individuals that were the subject of Judge Robert L. Carter's Order in *Vigile v. Sava*, No. 81 Civ. 7372,7371 (RLC) (S.D. N.Y. 1982), and the Second Circuit's recent opinion in *Bertrand v. Sava*, No. 82-2110 (2d Cir. June 25, 1982), which the Court understands to be 53 individuals.

This Order is hereby made a part of the Court's Final Judgment in this cause of this date. To the extent that Final Judgment was a partial one awaiting the Court's ruling on the motion for reconsideration, it is now final as to all counts. To the extent that this Order modifies the class definition set forth in the Final Judgment, the class as modified herein shall be entitled to all of the relief afforded by that final judgment.

DONE AND ORDERED this 29 day of June, 1982 at Miami, Florida at 4:24 p.m.

/s/ Eugene P. Spellman
United States District Judge

Copies furnished to:

all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-CIV-EPS

LUCIEN LOUIS, ET AL., PLAINTIFFS

vs.

ALAN C. NELSON, ET AL., DEFENDANTS

ORDER DENYING DEFENDANTS' MOTION TO MODIFY THE CLASS AND AMEND THE FINAL JUDGMENT

THIS CAUSE came before the Court on Defendants' motions for modification of the class definition and modification of the Final Judgment. Having reviewed the recorded in this cause and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Court finds to be without merit Defendants' contention that the class cannot include individuals who are not a part thereof at the time of Final Judgment. *Gilmore v. James*, 274 F.Supp. 75 (N.D. Texas 1967), *Aff'd per curiam* 389 U.S. 572 (1968); *Powell v. Ward*, 487 F.Supp. 917 (S.D.N.Y. 1980); *Cape May Co. Chapter, Inc., Izaak Walton League v. Macchia*, 329 F.Supp. 504 (D.N.J. 1971). This is not a case, as in *Matthews v. Diaz*, 426 U.S. 67, 71 n.3 (1976), where prerequisites to invocation of this Court's jurisdiction require such a modification and, therefore, Defendants' motion for modification of the class is DENIED.

2. Defendants' motion to amend the Final Judgment to permit prospective application of the detention policy for ten (10) days is DENIED. Although it is not clear from the motion, the Court believes Defendants are arguing under Federal Rule of Civil Procedure 59(e) that the Judgment in this regard should be altered or amended because it is erroneous as a matter of law. The Court has already addressed this issue in its Final Judgment wherein it stated that the detention policy is null and void unless it is adopted in accordance with the Court's Memorandum Opinion and the relevant statutory provisions. The Court believes that enjoining the future application of the detention policy is the proper remedy until it is properly adopted and it will not, therefore, modify the Final Judgment as requested.

To the extent that Defendants believe they may suffer irreparable harm or the public's interest will be disserved by enforcement of the prospective provisions of the Final Judgment, the proper remedy is to seek a stay of those provisions. The propriety of entering a stay in that regard at the present time will be addressed in a subsequent Order of the Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 30 day of June, 1982, nunc pro tunc to 11:00 AM this date.

/s/ Eugene P. Spellman
United States District Judge

Copies furnished to:

All counsel of record

UNITED STATES COURT OF APPEALS
ELEVENTI CIRCUIT

No. 82-5772

MARIE LUCIE JEAN, ET AL., PLAINTIFFS

LUCIEN LOUIS, ET AL., PLAINTIFFS-APPELLEES

MIAMI DAILY NEWS, ET AL., INTERVENORS-APPELLANTS

v.

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS, CROSS-APPELLEES

July 13, 1982

Rudolph W. Giuliani, Assoc. Atty. Gen., U.S. Dept. of Justice, Washington, D.C., for defendants-appellants, cross-appellees.

Kurzban & Kurzban, P. A., Ira J. Kurzban, Michael J. Rosen, Miami, Fla., Bruce Winick, American Civil Liberties Union Foundation of Florida, Inc., Coral Gables, Fla., for plaintiffs-appellees.

John Kendrick Tucker, Deputy Atty. Gen., Tallahassee, Fla., for intervenor-appellant State.

Appeal from the United States District Court
for the Southern District of Florida

ON MOTION FOR PARTIAL STAY

Before GODBOLD, Chief Judge, and HATCHETT and CLARK, Circuit Judges.

BY THE COURT:

The United States has moved for a partial stay of the judgment of the United States District Court for the Southern District of Florida entered June 29, 1982. Hearing and briefing have been expedited, and the Court has heard oral argument and has considered the briefs.

To justify granting the partial stay the United States would be required to show that the following circumstances exist: (1) likelihood of ultimate success on appeal; (2) irreparable injury to the government; (3) granting the stay will not substantially harm plaintiffs; and (4) the public interest will be served by the partial stay.

The government has not been able to show that any one or more of these circumstances exist.

The motion for partial stay is DENIED.

The case is expedited for hearing on an early oral argument calendar.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 82-5772

MARIE LUCIE JEAN, ET AL., PLAINTIFFS

LUCIEN LOUIS, ET AL., PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

STATE OF FLORIDA, INTERVENOR-APPELLANT

v.

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS, CROSS-APPELLEES

April 12, 1983

Stanley Marcus, U.S. Atty., Miami, Fla., Leon B. Kellner, Asst. U.S. Atty., Robert L. Bombaugh, Atty. Gen., U.S. Dept. of Justice, Rudolph W. Giuliani, Associate Atty. Gen., Washington, D.C., for defendants-appellants, cross-appellees.

Kurzban & Kurzban, Ira J. Kurzban, Nat'l Emerg. Civ. Lib. Foundation and Haitian Refugee Center, Inc., Miami, Fla., Mary Gilmore and Terrence A. Corrigan, New York City, Michael J. Rosen, Miami, Fla., Christopher Keith Hall, New York City, for plaintiffs-appellees, cross-appellants.

Vera Weiss, Haitian Refugee Center, Inc., Miami, Fla., Bruce J. Winick, ACLU Foundation of Fla., Inc., Coral Gables, Fla., Irwin P. Stotzky, Univ. of Miami, School of Law, Coral Gables, Fla., for Haitian Refugee Center.

Kendrick Tucker, Deputy Atty. Gen., Tallahassee, Fla., for intervenor-appellant State of Fla.

Appeals from the United States District Court
for the Southern District of Florida

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

OPINION OF THE COURT

KRAVITCH, Circuit Judge:

This suit is before us on appeal from an order releasing over one thousand Haitian immigrants held in detention by the United States Government. The government detained the Haitians as part of a stringent immigration program that followed on the heels of the massive Cuban migration during the Mariel boatlift of 1980. Pursuant to the new policy Haitians were detained in camps or prisons pending a final determination of their right to remain in this country, a process that took months, or in some cases over a year.

This is a complicated case. The issues presented are complex. And, it is an involved case. The record on appeal is voluminous. It is a delicate matter as well: the court below noted the extensive publicity this case has received, and the strong feelings with which it is regarded by either side.

The judgment of the court below ordered the release of the detained Haitian immigrants. The district court's opinion stressed one basic principle: although the Executive, in concert with Congress, has wide authority to act to protect our borders, the governing branches must nonetheless act within the letter of the law. Despite our differences with the district court as to many of the individual bases for decision, as well as some particulars of the relief afforded, we concur in the judgment freeing the Haitians, and in that underlying rationale.

I. The Predicate

A. *The Procedural Predicate*

During the week of June 1-5, 1981 the Immigration and Naturalization Service ("INS") held mass "exclusion" hearings for Haitian immigrants to determine whether they were admissible to this country, or should be deported. Many hearings were held behind locked doors in courtrooms from which counsel attempting to inform the Haitians of their rights were barred. Overwhelming evidence established that Creole translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights. Pursuant to these faulty hearings many Haitians were adjudged excludable from this country, and were subject to deportation.[1]

Although exclusion and the procedures by which exclusion occurred provided initial impetus for this action the issue of detention too was significant. Pursuant to Administration policy many Haitian immigrants were held in detention camps prior to a determination of excludability. Because of procedural difficulties, and the unwillingness of the government to parole those incarcerated, detention frequently continued for months; in some cases for over a year. In response to this situation the Haitian Refugee Center ("HRC") filed this cause in the United States District Court for the Southern District of Florida. Originally filed as a petition for habeas corpus on behalf of those unlawfully excluded from this country, the complaint was subsequently amended to request class certification allowing named plaintiffs to sue on behalf of themselves and a class of Haitian refugees similarly situated. Alleging seven grounds for relief, *inter alia* discrimination in enforcement of Administration policy and rule-

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[1] At some stage in the proceedings the government deported eleven Haitians pursuant to procedures they admitted were faulty and not in compliance with law. There is no appeal from an unlawful deportation. 8 U.S.C. § 1105a(c).

making in contravention of required administrative procedure, plaintiffs sought declaratory relief as to the validity of their claims as well as an injunction against enforcement of the Administration's policy mandating such proceedings and detention. Plaintiffs also sought a stay of deportation for any Haitian excluded pursuant to the challenged procedures and a stay of exclusion hearings for Haitians unrepresented by counsel. Hearings commenced shortly thereafter on preliminary injunctive relief.

On September 30, 1981, in a strongly worded opinion, the district court certified the class. The court found the INS was playing "a human shell game" with the Haitians, moving them around the country to desolate areas without available counsel or communication facilities. The court further found faulty the INS proceedings whereby eleven Haitians were deported; these proceedings included mass hearings, behind closed doors, without counsel or adequate translators. *Louis v. Meissner*, 530 F.Supp. 924, 926-28 (S.D. Fla. 1981) ["*Louis I*"]. The court therefore enjoined deportation of, and further exclusion hearings for, class members unrepresented by counsel. The government chose not to appeal the preliminary injunction and requested an immediate trial.

On February 24, 1982, the district court dismissed four of the seven claims in the original complaint on jurisdictional grounds.[2] *Louis v. Meissner*, 532 F.Supp. 881 (S.D. Fla. 1982) ["*Louis II*"]. That dismissal, which eliminated many procedural issues, brought to the fore the question of detention. On March 15, 1982, a six-week trial commenced. Three general issues were tried: a claim that the Administration implemented its new immigration policy in violation of the Administrative Procedure Act

[2] A number of judges heard different proceedings in this action. The district judge who entered the order enjoining exclusion hearings was not the same judge who eventually rendered judgment on the merits.

["APA"] by failing to engage in notice and comment rulemaking; a claim that the immigration policy was enforced against the Haitians in a discriminatory manner, contravening their fifth amendment equal protection rights, and an issue of first amendment access rights among the Haitians, their attorneys, family and friends.

In a memorandum opinion dated June 18, 1982, *Louis v. Nelson*, 544 F.Supp. 973 (S.D. Fla.) [hereinafter "*Louis III*"], Judge Spellman determined that the government had violated the Administrative Procedure Act; consequently he held the detention policy "null and void" and reinstated a prior policy of parole, one he determined "is in full force and effect." Pursuant to the prior policy the court ordered the release of all class members. It further held the plaintiffs had failed to prove their discrimination claim. Finally, the court declined to rule on the access claim, ostensibly because the issue was mooted by the release order.

Following the government's submission of a notice of intention to engage in rulemaking the district court granted a partial stay, the effect of which was to permit detention of aliens who arrived between the date the final judgment was entered and the date the new rules for detention were promulgated. The government appealed the judgment as to rulemaking; plaintiffs cross-appealed the discrimination and access issues, as well as the jurisdictional dismissal of the procedural claims. On July 13, 1982, this court denied the government's emergency motion for a stay pending appeal.

B. *The Factual Predicate*

Haitians first began to appear on our shores in numbers in the early 1970's. Often travelling in small boats barely suited to ocean travel, the Haitians came to America seeking relief from economic oppression, as the government would have it, or to escape political oppression, as plaintiffs assert. By 1981, when the government ac-

tion giving rise to this lawsuit began, the number of undocumented Haitians living in the south Florida area was estimated at thirty-five thousand.[3]

Although the decade-long influx of undocumented immigrants from the Caribbean basin to south Florida presaged the end of the Administration's permissive attitude toward illegal immigration, an influx in which the Haitians participated, it was the arrival of Cuban immigrants that had the greatest impact. In the spring of 1980 the Mariel boatlift or "Freedom Flotilla" brought some 125,000 Cubans to our shores in a number of weeks. *Louis III*, 544 F.Supp. at 978. In response to this sudden, massive immigration, President Carter appointed a Select Committee on Immigration to examine the country's immigration woes. That committee issued a report in February, 1981 finding that an "immigration crisis" existed in this country. *Louis III* at 979. The "crisis" passed unresolved to the new Administration and in March 1981 President Reagan appointed a special task force to consider solutions. This body included the Secretaries of State, Defense, Transportation, Labor, Commerce, Health and Human Services, and the Director of the Office of Management and Budget. *Id.*

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[3] In its statement of facts the government refers to the Haitian immigration as a "massive influx." Because this colors the issues somewhat, we note this characterization is not entirely correct. Over the last ten years some 35,000 to 40,000 Haitians have arrived at our shores. Brief of United States, Statement of Facts, p. 6 (35,000 in ten years); Testimony of Alan C. Nelson, 47 Tr. 1957-58 (45,000-50,000 in 15 years). The Commissioner of the INS testified that as compared to illegal immigrants of the last ten years the 40,000 Haitian figure "is not a very high percentage," especially when compared with the influx of Mexicans, which constitutes the highest percentage. The district court's opinion noted a Task Force statement of "the mass influx of Cubans and Haitians . . . ," *Louis III* at 979, but that takes into account the arrival of 125,000 or more Cubans in several months, or three times the total number of Haitian immigrants in a fraction of the time. By almost all accounts it was mass immigration of Cubans that prompted tightening the net in which the Haitians were caught.

The task force examined several immigration problems, one of which was the number of undocumented aliens unlawfully in this country. Figures gathered by the task force indicated some three to six million aliens had settled here in violation of immigration laws. This massive body, living in constant fear of deportation, oftentimes was exploited by unscrupulous employers. Rather than attempt to apprehend these millions of immigrants, however, the Administration determined to offer a general amnesty to undocumented aliens in this country since 1978. Acting upon a task force recommendation the Administration proposed a special immigrant status to these illegal aliens. *See* 40 Cong. Q. Weekly Report 3097-98 (1982) (S.2222 & H.R. 7357, neither of which has yet been enacted into law, contain "amnesty" provision).

The problem of the continuing influx into Florida remained. In fact, some task force members feared the amnesty program would trigger increased efforts by aliens to immigrate unlawfully, falsify their date of arrival, and claim entitlement to the amnesty status. The task force report proposed several solutions to the problems of unlawful immigration, therefore, including sanctions against those who employ illegal aliens, and amendment of the criminal laws regarding the rendering of assistance to aliens wishing to immigrate.

One particular recommendation adopted by the Administration as part of its new immigration policy gave rise to this suit. As part of the crackdown on unlawful immigration the task force recommended detaining aliens without parole pending a determination of their right to enter the country. The government had not resorted to widespread detention of undocumented aliens since 1954.

C. *The Legal Predicate*

This section bridges the gap between a recommendation of detention and implementation of that policy. In the first part we discuss briefly the constitutional and statutory authority of the political branches over im-

migration matters, concluding that a policy of detention is within such authority and that Congress may delegate responsibility for detention decisions to the Executive branch. In the second part we review the rights of the Haitian immigrants as "excludable aliens" under the immigration laws, and conclude that although their rights are few, they are entitled to those rights explicitly granted by Congress. Finally, we review the statutory mechanism that grants the Attorney General authority to implement the recommendations of the task force.

1. *Authority of the Governing Branches*

We proceed to establish three essential points: (1) that the authority of the political branches over immigration matters and aliens is plenary and knows few bounds, (2) that Congress may, and has chosen to, delegate wide discretionary authority to the Executive to administer immigration matters, and (3) that the Executive's authority is limited by the statutory grant of Congress.

Although the Constitution fails to delegate specifically the power over immigration, the Supreme Court recognized almost a century ago that the political branches have plenary authority over immigration matters as an inherent concomitant of national sovereignty. *Mahler v. Eby*, 264 U.S. 32, 41, 44 S.Ct. 283, 287, 68 L.Ed. 549, 555 (1924); *Ekiu v. United States*, 142 U.S. 651, 659, 12 S.Ct. 336, 338, 35 L.Ed. 1146, 1149 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 604, 9 S.Ct. 623, 629, 32 L.Ed. 1068, 1075 (1889) ["the Chinese Exclusion Case"]. Protection of the national borders is within the authority of the national government, inferred from the enumerated foreign commerce, treaty, war, and naturalization powers. *The Chinese Exclusion Case*, 130 U.S. at 604, 9 S.Ct. at 629, 32 L.Ed. at 1075. *See generally* Gordon & Rosenfeld, *Immigration Law and Procedure* § 1.5a (rev. 1982) [hereinafter "*Gordon*"]. Authority over the national borders encompasses all immigration matters, including exclusion of aliens. *Gordon* § 1.5a.

Congress and the Executive branch share the immigration power. *Ekiu*, 142 U.S. at 659, 12 S.Ct. at 338, 35 L.Ed. at 1149. It may be exercised by the Executive and the Senate through the exclusion of treaties, *id.*, through the legislative powers of Congress, *id.*; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317, 324 (1950), and in part by the Executive branch acting alone, as a function of its plenary authority over foreign relations. *Knauff v. Shaughnessy*, 338 U.S. at 542, 70 S.Ct. at 312, 94 L.Ed. at 324; *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936). "Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the Executive department of the sovereign, Congress may in broad terms authorize the Executive to exercise the power, ..." *Knauff v. Shaughnessy*, 338 U.S. at 542, 70 S.Ct. at 312, 94 L.Ed. at 324.

Congress traditionally exercises authority over matters of immigration and exclusion through passage of immigration legislation. *See generally Gordon* § 1.2d-1.4g (detailing history of immigration laws). The most recent comprehensive piece of such legislation is the Immigration and Naturalization Act of 1952 as amended and codified at 8 U.S.C. [hereinafter "the 1952 Act"]. The 1952 Act is the primary focus of this suit; through this vehicle Congress transferred great authority over immigration to the Executive branch, the principal actor being the Attorney General. Section 1103(a) of the Act provides:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as [power is delegated to other actors] . . . .

The Act further provides: "[t]hat determination and ruling by the Attorney General with respect to all ques-

tions of law [under the Act] shall be controlling." *Id.* The Attorney General is given authority to delegate his powers under the Act to other employees of the Immigration and Naturalization Service or the Department of Justice. *Id.*

The Act vests in the Attorney General enormous statutory and discretionary authority over the procedures and policies of immigration. *See* 8 U.S.C. § 1103 (powers and duties of the Attorney General and Commissioner) (rulings of Attorney General controlling on questions of law; has control over employees of Service; may delegate any duties in his discretion; prescribes regulations, forms and bond; controls borders and appoints employees in his discretion for that purpose). This grant of discretionary authority ranks among the broadest of delegations by Congress to a government officer. *Cf.* K. Davis, Administrative Law Treatise § 8.10 (2d ed. 1979) [hereinafter "*Davis*"] (1952 Act replete with provisions allowing Attorney General to, in his discretion, take action concerning an alien). The authority further is delegated from the Attorney General to the Commissioner of the INS, as well as to regional and district directors. *Id. Gordon* § 1.7b. Even on the lowest rungs of the immigration service decisionmaking discretion is exercised in the name of the Attorney General.[4] *See Davis* § 8.10 (Attorney General's discretion exercised by the seven thousand employees of INS); *Gordon* § 1.7b (Attorney General may delegate any of his powers or duties to any officer or employee of INS).

Although the wide Congressional grants of discretionary authority embodied in the 1952 Act are permissible

[4] The Attorney General is statutorily authorized to confer on *any* employee of the United States the authority and duties of an INS employee. 8 U.S.C. § 1103(a); *Gordon* § 1.7b. While this far-reaching a delegation did not arise in this suit, attenuated delegation of unguided discretionary authority certainly contributed to the misadministration of government policy. *See infra* at 1473-1474 (detailing lack of guidance of parole decisions).

in the face of the inherent Executive function to manage foreign affairs, *see supra*, the Executive's ability to act in the absence of a Congressional grant of authority is limited. *Mahler v. Eby*, 264 U.S. 32, 45, 44 S.Ct. 283, 288, 68 L.Ed. 549, 557 (1924); *cf. Knauff v. Shaughnessy*, 338 U.S. at 542, 70 S.Ct. at 312, 94 L.Ed. at 324 (executive officers may be entrusted in broad terms to carry out Congressional intent). However, the joint authority of Congress and the Executive over immigration, and particularly over aliens seeking admission to this country, is extremely broad. *Gordon* § 1.5a; *Knauff v. Shaughnessy*, 338 U.S. at 542-44, 70 S.Ct. at 312-13, 94 L.Ed. at 324-35.

2. *Rights of the Alien*

Legal "rights" of an alien vary with his "status" under the 1952 Act. The determinative factor is whether the alien has effected an "entry" into this country. *Leng May Ma v. Barber*, 357 U.S. 185, 188, 78 S.Ct. 1072, 1074, 2 L.Ed.2d 1246, 1248-49 (1958) (law distinguishes between aliens on border seeking to enter and aliens in country, whether legally or not); *Barber v. Gonzales*, 347 U.S. 637, 640, 74 S.Ct. 822, 824, 98 L.Ed. 1009, 1012-13 (1954) (whether individual is deportable depends on "entry" status under Act). *Compare* 8 U.S.C. §§ 1221-1230 (rights of aliens seeking to enter) *with* 8 U.S.C. §§ 1251-54 (rights of aliens in deportation). As a general rule aliens who have effected an entry, whether lawfully or not, are accorded the full panoply of traditional due process rights. *See Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956, 963 (1953) [hereinafter "*Mezei*"]. As a function of plenary Congressional authority, however, aliens seeking to enter this country, as opposed to those who have entered, find much less process due an adjudication of their right of entry.[5]

[5] "The irony of this distinction is that deportable aliens, many of whom entered this country surreptitiously, are given more rights

In several cases decided in the early 1950's the Supreme Court emphasized the limited rights of an alien seeking entry. *See Mezei, supra*, 345 U.S. at 212, 73 S.Ct. at 629, 97 L.Ed. at 963; *Knauff v. Shaughnessy, supra*, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1950). In *Mezei* the Court held that an alien's constitutional and statutory rights were not violated when he was excluded from the United States upon order of the Attorney General for security reasons without a hearing or disclosure of evidence, even when that exclusion resulted in indefinite detention on Ellis Island because all efforts to deport him had failed. The Court noted that an alien who has effected entry is entitled to proceedings conforming to traditional due process. "But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" (citation omitted).

Congress has not left the excludable alien without rights, however. In the 1952 Act Congress provides a process for determination of an alien's claim of admission; although limited that process affords the aliens certain traditional due process protections. An alien seeking entry is entitled to a determination of the validity of his claim in an exclusion hearing before an immigration judge (equivalent to an administrative law judge). At the hearing an alien has the right to be confronted with, and combat, the evidence against him, to examine and cross-examine witnesses, and to present evidence. *See generally* 8 C.F.R. § 236.2 (hearing procedures); *Gordon* § 3.19a & b (same). Further, should the immigration judge decide the alien is not entitled to entry, that decision may be appealed to the Board of Immigration Appeals

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under the law than excludable aliens who present themselves to immigration. The practical effect of this is to encourage those who attempt to sneak across the border because they are rewarded with greater rights than those aliens who attempt to comply with our laws." *Louis III* at 977 (footnote omitted).

acting as surrogate for the Attorney General, 8 U.S.C. § 1226(b); 8 C.F.R. § 236.7, and finally the alien may challenge the order of deportation in the appropriate United States District Court by way of a writ of habeas corpus, 8 U.S.C. 1105a(b).

Accompanying the statutory right to an exclusion proceeding are several incidental statutory entitlements. For example, any alien arriving at our shores may file an application for asylum with the district director or the immigration judge. 8 C.F.R. § 208.3. Although a number of practices incidental to the exclusion hearing are here challenged, one particular concomitant power—the parole power of the Attorney General—provides the primary basis for this litigation.

3. *The Attorney General's Parole Authority*

Because entry status is determinative of the procedure afforded an alien, aliens not clearly admissible are detained "at the border" by INS pending an exclusion hearing. 8 U.S.C. § 1225(b). This detention permits maintenance of the "no entry" status. Section 1225(b) provides in pertinent part:

> Every alien . . ., who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land *shall be detained for further inquiry.*

(emphasis supplied). Parole is a means, however, of allowing an alien into the country temporarily pending determination of admissibility in an exclusion hearing, without destroying the fiction of "no entry" status. To this effect 8 U.S.C. § 1182(d)(5)(A) provides in pertinent part:

> The Attorney General *may . . . in his discretion parole* into the United States temporarily *under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest*

> any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien . . . .

(emphasis supplied).

Exercise of the parole authority has varied. Prior to 1954 parole was rarely granted. After 1954, until the present time, however, this country maintained a policy of ready parole of aliens seeking entry into the country. As a result of the new policy announced by the Administration in 1981 the exercise of parole power has tightened again. *See infra* at 1468-1469 (discussion of old policy).

D. *The Policy Predicate*

Although the statutory scheme provides for detention and parole, enforcement of the statute has varied widely since its enactment, depending upon the "policy" of the current Administration. The policy here at issue, adopted as a result of the recommendations of the Task Force on Immigration, was announced in July of 1981 and inaugurated the Reagan Administration's program to "enforce" the immigration laws in order to gain control over the influx of undocumented immigrants. Count II of plaintiffs' complaint alleged the Administration initiated its policy without following procedures mandated by the Administrative Procedure Act. Count VII alleged discriminatory application of the policy.

Yet, after weeks of trial and pages of exhibits and testimony, no clear picture of the entire policy emerged. It is apparent the policy requires strict adherence to the "detention" language of § 235 of the 1952 Act, 8 U.S.C. § 1225(b), and a concomitant tightening of the discretionary parole authority in § 212 of the 1952 Act, 8 U.S.C. § 1182(d)(5)(A). Any further effort to define the policy, however, is futile on the basis of the record before us. Whenever plaintiffs offered a document purporting to establish the policy the government denied its

relevance, no doubt because the document inevitably was captioned "Haitian Program," which would constitute irresistible proof of discriminatory motive. Whenever the government witnesses sought to explain the policy the plaintiffs demurred on the ground it was nowhere in writing. No witnesses described the "policy" similarly. *See Louis III* at 981, n.22.

The resolution of this action requires an understanding of what the evidence at trial showed, or failed to show, about the policy. The district court made extensive findings, no simple task given the state of the evidence. We have reviewed those findings and carefully examined the evidence in order to determine whether that evidence supports the conclusions of the court below. Although we are in substantial agreement with the district court, which noted the failings of the evidence, we believe the court did not always apply its factual determinations in a consistent manner. In order to explain cogently where we agree and differ with the court below, we set out in full our understanding of what the evidence did, and did not, support in regard to the government's policy.

1. *The Old Policy*

Parole of aliens pending an exclusion hearing is a relatively recent phenomenon. Prior to 1954 it was INS policy to detain almost all aliens at the port of entry pending a determination of their admissibility. Gordon testimony, 38 Tr. 115, 123 *et seq*; 32 Int.Rel. No. 12 (March 27, 1955).[8] Large detention centers existed for this purpose at San Francisco, California and Ellis Island, New York. In 1954, however, the new Commissioner of the INS, General Swing, decided that this policy of mass detention was inhumane and unnecessary. General Swing consulted with the Attorney General, and they determined to close Ellis

[8] Interpreter Releases, published by the Common Council for American Unity, provides information on "Immigration, Naturalization and Related Problems."

Island. At that time the policy changed, and aliens were paroled freely into the United States pending a determination of admissibility. There were two exceptions to the rule of general parole: when there was a likelihood of the alien absconding, and when the alien's "freedom of movement could be adverse to the national security or the public safety." 32 Int.Rel. No. 12 (March 22, 1954). The parole policy was flexible in that reasonable restrictions could be imposed by INS to insure availability of the alien. *Id.*; *see also Leng May Ma v. Barber*, 357 U.S. at 190, 78 S.Ct. at 1075, 2 L.Ed.2d at 1250 (physical detention now exception not rule).

The 1954 closure of the Ellis Island immigration center was accompanied by announcements that detention of undocumented aliens in exclusion was to cease, except in "but a few cases" where the alien was deemed "likely to abscond or those whose freedom of movement could be adverse to the national security or the public safety." *See* Address of the Attorney General, Nov. 11, 1954, reported in 32 Int.Rel. No. 12, "New Detention Policy of the Immigration and Naturalization Service." The Attorney General acknowledged the general parole program as a change of policy. The Supreme Court haled the parole policy as one that exhibited the "humane qualities of an enlightened civilization," *Leng May Ma v. Barber*, 357 U.S. at 190, 78 S.Ct. at 1075, 2 L.Ed.2d at 1250.

The court below acknowledged the post-1954 general parole policy. *See Louis III* p. 980, n.18. We concur in its findings in this regard. This policy (prior to the recent change established at trial), [hereinafter "old policy"], was one of general parole. Detention was rare and limited to those aliens who were likely to abscond, or who posed a threat to the national security.

2. *The Policy Change*

On July 30, 1981 the President of the United States issued a statement emphasizing the need to "establish control over immigration" to guarantee that foreigners are admitted to this country "in a controlled and orderly fashion." That same morning the Attorney General of the United States addressed a joint subcommittee of Congress testifying that "[w]e have lost control of our borders. We have pursued unrealistic policies. We have failed to enforce our laws effectively." Testimony of William French Smith, Attorney General, before the Senate Subcommittee on Immigration and Refugee Policy and the House Subcommittee on Immigration, Refugees, and International Law, July 31, 1981, at 1 [hereinafter "*French Testimony*"]. Accordingly, the Attorney General announced the Administration's comprehensive plan to combat the country's immigration problems. Part of this program was a return to a policy of detention of undocumented aliens.

At trial, Administration officials could not agree on whether the policy actually changed following the President's pronouncement. Alan C. Nelson, former Deputy Commissioner, INS, who became Commissioner in January of 1982, maintained that no change in policy had occurred. Rather, increased "enforcement" of the detention statute resulted from the acquisition of detention space. Nelson stated: "plaintiffs' claim that INS has recently changed its detention policy by restricting the use of parole is not founded upon or supported by any change in the applicable statute or regulations." Plaintiff's exhibit ["Px] 71C (Declaration of Alan C. Nelson, and accompanying affidavit). Joe Howerton, the District Director of INS District VI in Miami also claimed the shift to detention was based only on the increased availability of detention space. 48 Tr. 2186. He disclaimed knowledge of, and testified he never received notice of, a change in policy following the President's announcement on July 30, 1981. *Id.* at 2211.[7]

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[7] Were it not for clear evidence of the "old policy" a plausible explanation for Nelson's and Howerton's disagreement with the rest of the Administration might be that the new policy involved

Despite the above testimony to the contrary, the evidence clearly indicates that the Administration viewed its announcement on July 31, 1981 as a change in direction of immigration policy. On the same day the President issued his statement both the Attorney General of the United States, William French Smith, and the then Commissioner of the INS, Doris Meissner, testified before Congressional committees. Smith, on behalf of the Administration, proposed a legislative package to reform many immigration laws. One specific request was for $35 million for increased detention space "to detain temporarily illegal aliens upon arrival pending exclusion or granting of asylum." *French Testimony* at 12. Detention was necessary as part of a progrm to "deter the continuing arrival of illegal undocumented aliens to our shores." Meissner described the litany of evils that led to the current immigration problem, then explained the new policy: "[t]herefore, in the future, undocumented aliens . . . will be placed in administrative detention pending the determination of their admissibility." Testimony of Doris M. Meissner, Commissioner, INS, before the Senate Committee on the Judiciary, Subcommittee on Immigration & Refugee Policy, July 31, 1981, at 2, 9 [hereinafter "*Meissner Testimony*"]. When deposed for this action Ms. Meissner was asked "[b]ut, it is your testimony if I understand it, that there was a change in policy and practice as of July 31, 1981," to which she replied, "[t]hat is right." Deposition of Doris Meissner, September 1, 1981 [hereinafter Meissner Dep.] at 7.

The district court reviewed this evidence and determined there had been a change in policy. It stated that "on July 31, 1981, the President issued a statement on the immigration policy of this nation." *Louis III* at 980. The district court repeatedly referred to the policy as the

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nothing more than increasing detention space. This explanation fails however in the face of overwhelming evidence that detention after 1954 was to be "the exception, not the rule." *Leng May Ma v. Barber*, 357 U.S. at 190, 78 S.Ct. at 1075, 2 L.Ed.2d at 1250.

"new policy," and based its Administrative Procedure Act ruling on a change in policy [hereinafter "policy change"]. This finding, that there was a change in policy, is amply supported by the evidence; on July 31, 1981 the immigration policy changed from what was instituted in 1954 when Ellis Island was closed, (the "old policy") to a new program, described *infra* (the "new policy").

3. *The New Policy*

Evidence concerning the substance of the Administration's "new policy" reveals the particulars of the new policy never were developed fully. Immigration inspectors were left to exercise discretion in an unguided fashion with the result that many individuals were deprived of their liberty in an arbitrary manner.

The Administration's anouncement of its new policy on July 30, 1982, was accompanied by much heraldry, but little substance. Although, the government was going to curb the waves of refugees arriving upon the shores of south Florida, it was not at all clear how this was to be accomplished within the framework of the immigration laws. The President's initial policy statement did not mention detention. He spoke of "sudden influxes of foreigners," and the need to "establish control over immigration" to ensure aliens are admitted, or not admitted, in a "controlled and orderly fashion." In this regard the President enumerated a number of "steps," none of which was detention. The statement concluded, "[t]he steps we take to further these objectives, however, must also be consistent with our values of individual privacy and freedom."

The Attorney General of the United States, charged by statute with regulation of immigration, testified before Congress on the day the President announced the new policy. Although he did mention detention, ". . . [t]he Administration will seek additional resources for the construction of permanent facilities in which to house undocumented aliens temporarily until their eligibility for

admission can be determined," he offered no specifics as to parole. His only guideline was evenhanded treatment. "By treating those who arrive by sea in the same way as we have long treated those who arrive over our land borders, our policy will be evenhanded, and we can avoid the severe community disruptions that result from large-scale migrations." *French Testimony* at 15.[8]

Three highly placed Administration officials gave insight into the specifics of the new policy. Doris Meissner, the former Commissioner of the INS testified before Congress, and was deposed for this action. Rudolph W. Guiliani, Associate Attorney General, the third ranking official at the Department of Justice, bearing primary responsibility for immigration, testified at trial. Commissioner Nelson also discussed the specifics in his trial testimony. The officials contradicted one another several times, and did not agree on the substance of the policy.[9]

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[8] What the Attorney General could have meant by this remark is unclear. Evidence at trial showed that over 200,000 Mexicans arrive here every year, undetected, and remain in the country. See Px71a (memorandum to President's Task Force from Hiller) (19 May 1981). Additionally, the new policy as to Mexicans was to have a temporary worker permit for some of them, an advantage not at all available to Haitians. See *French testimony* at 8 (proposed temporary worker program for Mexican nationals). Further, government witnesses stated Mexicans apprehended at the border choose to voluntarily return to Mexico (perhaps to try again), which is not universally the case with the Haitians, so they hardly can be equated. *See Louis III* at 1001 (voluntary withdrawal of Mexicans).

[9] For example, Guiliani testified that parole was appropriate for "exigent circumstances, humanitarian reasons," 49 Tr. 2270 but admitted "I'm not sure I know all the categories of parole." *Id.* at 2322. (Guiliani in fact failed initially to distinguish detention from parole, claiming § 235 of the 1952 Act required detention unless there was a colorable right to enter, or unless one of the exceptions for "exigent circumstances, humanitarian reasons" was met. 49 Tr. 2269-70. Section 235, of course, contains no exceptions). Nelson's testimony did not differ significantly from Guiliani's. He stated parole was available for "emergency reasons or public policy

This evidence, and lack thereof, indicates the disarray with which the Administration pursued its new policy.[10] The district court generally took a similar view of the facts. It stated, in a section entitled "policy change,"

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reasons and this situation where there might be medical or family reunification considerations—." 47 Tr. 1887. (Nelson may have meant "emergent reasons." 8 U.S.C. § 1182 specifically provides for discretionary parole for "emergent reasons or for reasons deemed strictly in the public interest"). Neither the testimony of Nelson, nor that of Guiliani, explained the policy in any depth, however.

Commissioner Nelson's testimony conflicted directly with that of his predecessor, Commissioner Meissner. Meissner testified that although not the sole factor, an alien would be subject to release if he established a prima facie case for asylum, regardless of document status. Meissner Dep. at 5, 9; *Meissner testimony* at 9. Nelson disagreed. At trial he stated a valid claim for asylum would not justify avoiding detention if documents were fraudulent. 47 Tr. 1999.

Fortunately, Meissner's testimony, both before Congress and in her deposition, was forthright enough to allow us to understand the basic policy. Before Congress she stated:

> Therefore, in the future, undocumented aliens arriving in the United States who do not choose to depart voluntarily will be placed in administrative detention pending the determination of their admissibility. The only exceptions will be those who have prima facie claims for asylum or legal immigration status, or who have close relatives residing legally in the United States.

Meissner testimony at 9. On another date she made clear the new policy was "really quite the opposite" of the old. Meissner Dep. at 5.

Of greatest import, however, was Meissner's candor. On September 1, 1981, six weeks after the Administration announced its new policy, she admitted the policy was not being applied uniformly, time and time again admitted these were new procedures not fully developed, and stated: "we are just pulling this all together now to be certain that it is uniform *because some of these things, as you know, have developed along different streams.*" Meissner Dep. at 8 (emphasis supplied).

[10] A sample of the conflicting testimony appears, *supra* n.9

Part of the new immigration program approved by the President called for more restrictive use of parole and increased use of detention. However, the Task Force's proposal in this area, and the statute on which they relied, did not indicate to those who had to administer the new policy which excludable aliens were to be detained. Justice Department and INS personnel were given the responsibility to develop the specific aspects of this plan.

The people in charge of drafting the detention guidelines were cognizant of the fact that the new policy was not applicable to all excludable aliens. INS never intended to physically incarcerate persons who complied with the prescribed procedures for admission but were excludable on minor, technical grounds such as a clerical error on their visa. The policy was designed to deal with another Mariel type situation, regardless of the nationality or number of the arriving aliens. Therefore, the guidelines for detention had to reflect the perceived characteristics such a group of aliens would have. The problem was isolating these characteristics and incorporating them into guidelines that were capable of being objectively applied in individual cases.

The President did not specify whether the development of specific detention and parole criteria was to be accomplished internally by INS or through a rulemaking procedure in which the public could participate. *INS elected to do neither.* They admitted to the Court that they made a conscious decision not to promulgate a rule pursuant to the Administrative Procedure Act. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission.

(emphasis in original).

Defendants can point to no operating instruction, internal memorandum or other document that completely reflects the official detention policy. Consequently, the Court cannot precisely define the criteria for detention any better than the Government's witnesses articulated them. However, the general theme that emerges from the evidence is that aliens are to be detained unless and until they establish to INS' satisfaction a prima facie claim for admission. Within this framework, the District Director had no discretion to grant deferred inspection to Haitians arriving aboard non-signatory carriers without first placing them in detention.

Louis III at 980-81 (emphasis supplied).[11]

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[11] The distinction between criteria for detention and criteria for parole is blurred throughout the trial. The district court attempted to eliminate the confusion, noting:

> In referring to 'criteria for detention' the Court means those factors that would be considered by the immigration inspector in determining whether an excludable alien should be given a deferred inspection or placed in detention. Parole criteria are factors to be considered in determining whether an alien in detention should be released.

Louis III at 981 n. 23. The district court's opinion indicates, however, that the Administration failed to develop criteria for either parole *or* detention. *Id.* at 981 (President failed to specify whether detention and parole criteria were to be developed internally or through rulemaking; "INS elected to do neither"). That is why we cite as error the requirement of the court below that plaintiffs bear the burden of including in their statistics certain parole criteria. There is no basis in the record for identifying any specific parole criteria. The testimony is contradictory as to what the criteria were, and fails to show that *any* criteria were provided to those enforcing the policy.

One further point bears notice. The district court stated in the textual quote "the District Director had no discretion to grant deferred inspection to Haitians arriving aboard non-signatory carriers without placing them in detention." Through not at issue on appeal, the significance of this statement relates to one government formulation of its policy, *i.e.*, that it only applied to those arriving

In its determination that the new policy never was promulgated or set out in guidelines the district court was correct. That evidence amply supports that determination. In its determination that the record provided no more than a general sense of the criteria for parole and detention the court was likewise correct. The evidence shows that the new policy announced in July, 1981, was never more than a general plan because INS and the Department of Justice failed to follow through with implementing regulations or guidelines.

4. *Unguided Discretion—Implementation of the Policy*

The most significant and telling testimony was that dealing with the transfer of authority to those responsible for implementing the new policy. The testimony indicates

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aboard "non-signatory" carriers. This formulation, an attempt to distinguish the arriving Haitians from other illegal immigrants, suffers two difficulties.

First, it is unsupported by any evidence. One considerable body of statistical data employed by plaintiffs was extracted from the airport logs in District VI. Airlines are signatory carriers. As the detention policy clearly was being enforced at the airport, the "non-signatory" formulation can have no merit.

Second, as a constitutional matter the government's suggestion of this formulation is further evidence of intentional discrimination. Many immigrants enter this country illegally; almost none save the Cubans and Haitians arrive by "non-signatory" carriers. Some aliens surreptitiously cross the border on foot. Others arrive aboard signatory carriers with false or fraudulent documents. The small unregistered boats ("non-signatory carriers") in which the Haitians arrive, however, according to the government formulation, were singled out for special treatment.

Though this case never reached the examination of a rational reason for the discriminatory treatment, because plaintiffs' prima facie case was unrebutted, some government witnesses suggested the "signatory"/"non-signatory" distinction was to prevent another Mariel boatlift. The effect of the line-drawing suggested by some, however, is to deter with one narrowly formulated rule the immigration of aliens we do not wish to have enter, while treating quite differently other classes of equally "illegal" immigrants.

no one in the chain of command from the Attorney General to the immigration officers at Krome North, where the Haitians were detained, admitted to ever receiving or giving guidance as to who should be free and who should be incarcerated.

Guiliani, the Associate Attorney General, testified that parole decisions were to be made on a case-by-case basis. 49 Tr. 2318. He declined to answer specific hypotheticals based on individual factors because he believed there should be no general rule, but a careful consideration of all the facts. *Id.* at 2317-2326. He did state that if the policy were being applied in a discriminatory manner, that was contrary to the intent of the Attorney General, and that the person who is doing it "should be reprimanded or dismissed, maybe." *Id.* at 2343.

Nelson, who followed Meissner as the Commissioner of INS, testified that district directors have primary responsibility for parole subject to general INS policy. 47 Tr. 1882. He adhered staunchly to the view that the district director, and not employees under him, should be responsible for the exercise of discretion in parole, subject to general guidelines, *id.* at 1968. Admitting that an Immigration Inspector might make the initial determination, Nelson nonetheless insisted:

> "the basic responsibility is in the district director. Certainly he would not delegate that across the board. The person on the scene such as the inspector would obviously advise the district director on various issues which would lead to the district director's determination.

Id. at 1967. Disclaiming knowledge of any specific case, Nelson testified that if discrimination in detention and parole was occurring, "I would very promptly get personal knowledge of that allegation." *Id.* at 1971-72.

Joe Howerton, the District Director in Miami and thus, according to Nelson and Guiliani, ultimately responsible for Haitian parole, testified that he was familiar with the

general criteria as to parole, but because parole was a matter of discretion on the part of the person granting parole, he "could not attest to [the criteria] in any individual case." 48 Tr. 2159. In his deposition he testified he had "delegated down" his authority. Howerton Dep. at 12. At trial he said he had delegated his parole authority to his assistant director Alan MacAtee, 48 Tr. 2156, then under cross-examination admitted he had to assume MacAtee had further delegated the authority to the people at the airport because MacAtee was not at the airport, and that was where parole occurred. *Id.* at 2157. Parole authority at Krome, where many Haitians were detained, was delegated to Mr. Leonard Rowland, and Howerton was unaware if there were further subdelegations. He did state he never received guidelines as to parole after July 30, 1981 and denied there was a policy change other than in detention space. *Id.* at 2180-90. As to the Presidential announcement on July 30, 1981, Howerton stated "many people continue to make announcements but that doesn't necessarily reflect a policy change." Howerton Dep. at 19.

Rowland, to whom Howerton's parole authority at Krome was delegated, was deposed prior to trial. Rowland admitted he had not personally reviewed each individual case, Rowland Dep. at 86. Nor did he ask anyone else to review each case for parole. *Id.* at 95. Instead, he had his employees review files to see if everything generally was in order, and assumed they would let him know if in the course of file maintenance an appropriate case for parole presented itself. *Id.* at 89-90.[12]

[12] A case in point is Marie Puzo, an immigration inspector sent down by the eastern office in Burlington, Vermont, to help at Krome. Rowland Dep. at 88. Within the framework here presented Puzo was one of the immigration staff in whose hands the liberty of the Haitians ultimately rested. Rowland did not know, but assumed she studiously reviewed each file and in the course of her general review would let him know if she found a case for parole. She was a "very competent officer," *id.* at 90, and did tell him on two or three occasions when a case for parole presented itself. *Id.* at 90-91.

Although the district court did not dwell on this delegation, or lack of it, and lack of communication of the policy, Judge Spellman did note "inconsistencies between what the government witnesses said the policy was and the policy their subordinates were carrying out." These inconsistencies the court attributed to "the absence of guidelines for detention and parole." *Louis III* at 981 n.24 (describing 15 year old boy in detention, separated from family in community).

In litigation that centers around a complex change in policy we find it significant that INS inspectors were authorized to perform the task of discretionary parole with a complete lack of guidance. It is clear no one knew exactly what the policy was, and no one in authority attempted to supervise the exercise of discretion under the new policy. Not surprisingly, the discretion was exercised with harsh results.

II. The Administrative Procedure Act

Count Two of the Haitian Refugee Center's complaint alleged the Administration's shift to the new policy was a "rule" within the meaning of § 551(4) of the Administrative Procedure Act ("APA"), and that the rule was established unlawfully because the Administration failed to comply with the procedural safeguards of 5 U.S.C. § 553(b) & (c). APA § 553 requires that an agency follow certain rulemaking procedures whenever it promulgates a "rule," unless a statutory exception to the rulemaking requirement applies. *See* 5 U.S.C. § 553(b)(A) & (B) (exempt rules); *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978) [hereinafter "*Guardian Federal*"]. Except in those instances when "on the record" rulemaking is required by statute, 5 U.S.C. § 553(c), an agency engaging in rulemaking must follow

the "notice and comment" rulemaking provisions of APA § 553(b) & (c), which require that an agency provide notice of a proposed rule in the *Federal Register*, and afford an opportunity for interested persons to present their views.

The court below found the new policy was a rule within the meaning of APA § 551(4), *Louis III* at 993, and the government conceded that the policy was instituted without employing rulemaking procedures, *id.* at 993. The district court therefore held invalid the new policy, and ordered a return to the old policy, under which parole was generally granted. Then, relying on the old policy, the district court ordered release of the Haitian refugees incarcerated by the federal government.

On appeal the government argues first that the policy change was not a rule. APA § 551(4) defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." The district court applied this definition to the new policy and found the change in policy was "clearly" a rule. We conclude the district court was correct; careful analysis of the APA shows the government's argument to be without merit.

A. *Rulemaking*

The APA establishes procedures governing the conduct of administrative agencies. The structural approach of the APA is to divide all the world of administrative action into two categories; an agency either issues an "order" by "adjudication" or a "rule" by "rulemaking." *Guardian Federal, supra*, 589 F.2d at 663; *Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System*, 516 F.2d 1206, 1215 & n.25 (D.C. Cir. 1975); *see U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act* 12-13 (1947) [hereinafter "Attorney General's Manual"]

(setting forth distinction between rulemaking and adjudication; definition of adjudication largely residual one based on rulemaking definition); *id.* at 126 (Appendix to Attorney General's Statement) (basic scheme of APA is to classify *all* administrative proceedings into two categories, rulemaking and adjudication).[13] *See generally* Schwartz, *Administrative Law* 143 (1976) (APA based on fundamental dichotomy between rulemaking and adjudication).[14]

Given the dichotomous structure of the APA, the Administration's new policy must be a rule or an order. The district court applied the definition of a rule set forth in § 551(4) and found that the policy change fell squarely within that definition. We agree an announcement that INS will universally enforce a detention policy while limiting parole is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . .," in other words, a rule. The government attacks this approach as simplistic, yet it is exactly what the Administrative Procedure Act requires.

A similar issue was before us in *American Trucking Association, Inc. v. United States*, 688 F.2d 1337 (11th Cir. 1982), where we were asked to determine whether an action taken by the Interstate Commerce Commission

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[13] "The courts have given deference to the interpretations of the Attorney General's Manual 'because of the role played by the Department of Justice in drafting the legislation.' *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546, 98 S.Ct. 1197, 1213, 55 L.Ed.2d 460 (1978)." *Guardian Federal*, 589 F.2d at 664 n. 21.

[14] Recent cases acknowledge a third form of administrative activity—the investigative function—that is not covered by the APA. *See, e.g., Guardian Federal*, 589 F.2d at 663, and cases cited therein, *id.* at n. 12. Even assuming the validity of the distinction, however, it is limited to administrative functions non-regulatory in manner and would not encompass the issues in this case, which are squarely within the regulatory realm of the INS.

(ICC) revoking all "special permission authorities" [15] was a "rule" within the meaning of APA § 551(4). Although the decision to grant or withhold a special permission authority in an individual case was discretionary in the ICC and required no recourse to notice and comment procedures, in *American Trucking* the ICC determined it would cancel *all* existing permission authorities and implied it would not issue any in the future. In a carefully reasoned opinion by the Chief Judge we held:

> While a decision in a particular case or cases to revoke a special permission authority would not be rulemaking, *the decision to reverse a longstanding and uniform practice by revoking all outstanding authorities* of a particular type and implicitly indicating that no such authorities will be issued in the future is *clearly a rule.*

688 F.2d at 1348 (emphasis supplied). This is the situation before us here. Although a decision to grant or deny parole in an individual case would not be rulemaking, the far-reaching policy announced by the government in this case, reversing the long-standing old policy and instituting the new policy "is clearly a rule." *Id.*

Despite the above authority the government argues that because the statute explicitly mandates detention, *see* 8 U.S.C. § 1225(b) ("shall be detained") and explicitly leaves parole decisions within the discretion of the Attorney General, *id.* § 1182(d)(5)(A) ("Attorney General may, . . . in his discretion parole"), no rule is required to enforce the statute. In other words, the government contends it is doing nothing more than implementing the express language of the statute. The government's argument, however, misses the mark; the fact that an agency

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[15] A "special permission authority" is a finding of cause that permits the ICC to reduce a 30-day waiting period before a proposed rate change goes into effect. *American Trucking Association, Inc.*, 688 F.2d 1337 at 1347.

need not employ rulemaking in order to exercise its discretion on a case-by-case basis does not mean it cannot or has not resorted to a rule of general applicability which limits its discretionary function. In the event there is resort to a rule, rulemaking is required. 5 U.S.C. §553.

In this regard *Fook Hong Mak v. Immigration and Naturalization Service*, 435 F.2d 728 (2d Cir. 1970), is instructive. In *Fook Hong Mak* appellant originally sought discretionary relief from the INS to prevent his deportation. His primary interest was an adjustment of status so he could remain lawfully in the country, but under regulations adopted by the Attorney General Fook Hong Mak was precluded from consideration for such relief.[16] The INS therefore denied him adjustment of status, and granted a request for voluntary departure. Fook Hong Mak challenged this action, stating that "whether or not the Board would have been justified in denying his application for adjustment of status on the merits, the Attorney General's self-imposed restriction [in the regulations] on the consideration of it is unlawful." 435 F.2d at 730. Denying Fook Hong Mak's claims, Judge Friendly wrote, "[w]e are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis. . . ." *Id.*

Fook Hong Mak stands for the proposition that an administrator vested with discretionary authority to act on a case-by-case basis may exercise that discretion by promulgating rules of general applicability. If the adminis-

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[16] The regulations applicable in *Fook Hong Mak* provided that aliens who obtained admission without a visa as being in immediate and continuous transit through the United States should not be eligible to apply for adjustment of status. 435 F.2d at 729. Fook Hong Mak fell into that class of ineligibles.

trator does announce a general rule, however, rulemaking procedures must be followed. 5 U.S.C. § 553(b) & (c). *See also Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 744-45 (3d Cir. 1969) (crucial fact not whether burden could be imposed in *ad hoc* order, but whether agency elected to proceed with general rule). Here the court below found the new policy to be a rule and we concur in that determination. Whether the statute allowed INS to exercise its discretion on a case-by-case basis without rulemaking is irrelevant; once a rule of general applicability was employed rulemaking was required. *Cf. Fook Hong Mak*, 435 F.2d at 730. Unless a specific exception to the rulemaking requirement of § 553(c) applies, therefore, it was error for the government to proceed to detain immigrants on the basis of the new policy without adhering to rulemaking procedures.

B. *Rulemaking Exceptions*

Complementing the broad definition of "rule" in § 551 (4) the APA provides a number of exceptions that permit promulgation of certain rules without recourse to the rulemaking procedures. *See* 5 U.S.C. §§ 553(a); 553(b) (A) & (B). The government urges that three of these exceptions apply in this case: the foreign affairs function exception, 5 U.S.C. § 553(a)(1), the interpretative rule exception, *id.* (b)(A) and the exception for general statements of policy, *id.*

1. *The "Foreign Affairs" Exception*

APA § 553(a)(1) exempts from notice and comment rulemaking those rules involving "a military or foreign affairs function of the United States." The legislative history of § 553(a)(1) indicates the exception should be construed narrowly to include only those " 'affairs' which so affect relations with other governments that, for example, public rulemaking provisions would clearly invoke definitely undesirable international consequences." S.Rep.

No. 752, 79th Cong., 1st Sess. 13 (1945). The district court found nothing in the record to support a finding that promulgation of the new parole policy would have resulted in "undesirable international consequences." *Louis III* at 996.[17] The court opinion stated: "At best, the connection between the detention policy and this country's conduct of foreign affairs is tenuous and certainly not substantial enough" to fit within the exception of 5 U.S.C. § 553(a)(1). *Id.* We agree.

Despite a dearth of case law on the exception embodied in § 553(a)(1), what precedent there is supports the district judge's conclusion that application of the exception in this case would distend that exception beyond the scope intended by Congress. *See Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980) (though immigration matters typically implicate foreign affairs court applied exception in light of extraordinary circumstances). The case *sub judice* readily is distinguishable from cases relied upon by the government. For example, in *Yassini* the court found an INS directive rescinding deferred departure for Iranian students to be within the foreign affairs exception on the basis that the Commissioner of the INS was "implementing the President's foreign policy." 618 F.2d at 1361. The court there found the challenged directive was part of the Administration's response to the November 4, 1979, takeover of the United States Embassy in Tehran. On November 10, 1979, in reaction to the takeover, the President directed the Attorney General to identify Iranian nationals not in compliance with the terms of their entry visas, and to take steps to deport those who violated immigration laws. *Id.* at 1359.

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[17] The court below not only found nothing in the record to support a finding of undesirable consequences stemming from publication of the new policy, it believed "[t]o the contrary, publication may have enhanced the deterrent effect of the new policy and deterrence is one of the goals the Government sought to attain by initiating the detention policy." *Louis III* at 996,

The directive at issue in *Yassini* was related intimately to the foreign policy of this country. At the time the directive issued Iranian militants held American nationals hostage at our embassy in Tehran, and the President was struggling to obtain their release. Actions taken by the Commissioner of the INS were in direct response to those release attempts. In its opinion the *Yassini* court noted "[a] rule of law that would inhibit flexibility of the political branches should be adopted with only great caution and judicial review of decisions made by the congress or the President in this area is limited." 618 F.2d at 1360.

This case does not involve sensitive foreign policy issues of a magnitude similar to those in *Yassini*. *See also Nademi v. INS*, 679 F.2d 811, 814 (10th Cir.) (visa regulations for Iranian nationals during embassy takeover; specific delegation from President to Attorney General to aid resolution of crisis), *cert. denied*, —— U.S. ——, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982); *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981) (voluntary departure regulations for Iranian nationals in face of embassy takeover). The government at trial offered no evidence of undesirable international consequences that would result if rulemaking were employed. It argues only that the new policy touched on national sovereignty because, in the course of developing the policy, the President requested and received international cooperation. Certainly many issues with which the President deals involve national sovereignty; not all would have undesirable international consequences if rulemaking procedures were followed. Not every request for international cooperation seriously may be called "foreign policy." In light of Congress' intention that this exception receive limited application the district court correctly found the exception inapplicable.

2. *Interpretative Rules*

APA § 553(b)(A) exempts from the requirements of notice and comment rulemaking "interpretative rules,"

and "general statements of policy." The district court correctly observed that although the categories differ the APA provides little guidance as to those differences. The government urges that the policy change at issue here is an "interpretative rule or general statement of policy," yet fails to distinguish between them and offers legal argument only for the conclusion that the policy change is a general statement of policy.

The *Attorney General's Manual* defines "interpretative rule" as an "agency's construction of the statutes and rules which it administers." *Id.* at 30 n. 3. Courts further define the term to mean "statements as to what the administrative officer thinks the statute or regulation means." *Chamber of Commerce v. Occupational Safety and Health Administration*, 636 F.2d 464, 469 (D.C. Cir. 1980); *Citizens to Save Spencer County v. Environmental Protection Agency*, 600 F.2d 844, 875 (D.C. Cir. 1979). Interpretative rules are a "clarification or explanation of existing laws or regulations rather than a substantive modification [of existing regulations] or adoption of new regulations," *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979) (citation omitted). Perhaps the most significant factor is that interpretative rules are non-legislative, in that they are promulgated without the exercise of delegated authority to create new law. *See American Trucking Association*, 688 F.2d 1337 at 1341 (11th Cir. 1982).

The announced new policy does not fit comfortably within any of the aforementioned qualifications. It goes further than "explanation" or "clarification" and states a new future course of action. The district court apparently agreed; it set forth the law concerning interpretative rules but drew no conclusion, proceeding instead to examine the rule as a general statement of policy. Because the government offers no support for application of the interpretative rule exception, analyzing the new policy only as a general statement of policy, and because we believe analysis as an interpretative rule in-

appropriate here, we also proceed to the general statement of policy exception.

3. *General Statement of Policy Exception*

The government argues finally that the new policy falls within the exception in APA § 553(b)(A) for "general statements of policy." The district court found the exception inapplicable. Although the law in this area is less than clear, we believe the district court applied the incorrect test, yet reached a correct conclusion.

The court below rested its determination that the new policy was not a general statement of policy on two grounds. First, the district court found the immediate impact of the new policy significant.

> Clearly, the new detention policy is not a general statement of policy that INS hopes to implement in the future. It is being implemented right now! Nor does it set a goal that future proceedings *may* achieve, for the change has been presented as a *fait accompli*. Immediately upon its effective date the former practice of freely paroling Haitians into the community ceased and a new policy paroling only humanitarian cases began. Thus, the new criteria for release is not exempt from APA requirements as a "general statement of policy."

Louis III at 996-97 (emphasis in original). Although some cases offer support for "immediacy" as a factor, *see Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974) (general statement of policy is an announcement to public of policy agency hopes to implement in future rulemakings); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979),[18] we do not believe this is the determina-

[18] Because *Brown Express* was decided by the Former Fifth Circuit we are bound by its holdings. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Our decision is not inconsistent with the *Brown Express* opinion. We do note the holding of *Brown Express* is not that immediacy

tive consideration. Nothing in the statutory phrase "general statement of policy" requires or even suggests that to fall within the exception the policy must take effect in the future. As Professor Davis recognizes, it is a general statement of policy to announce: "[o]ur general policy always has been and still is . . . ." *Davis* Supp. § 7.5, p. 169.[19]

Second, the district court relied upon a determination that the policy at hand had a "substantial impact" upon the incarcerated Haitians. The court applied its "substantial impact" test largely in reliance upon the decision in *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979). *Louis III* at 997. This reliance was misplaced. A careful reading of *Brown Express* indicates that opinion did not apply a substantial impact test to

deprives a rule of general statement of policy status, but that "[a]n announcement stating a change in the method by which an agency will grant substantive rights is not a 'general statement of policy' ". 607 F.2d at 701. That does not tell us what a general statement of policy *is*, only what it *is not*. We note further the rationale of *Brown Express* has come under attack recently by both court and commentator. *See Davis Supp.* § 7.4, at 166. (*Brown Express* is a gold mine of ideas "that mostly are contrary to established law"). At least one other panel of this circuit has described difficulties with the underlying reasoning of that opinion. *See American Trucking, supra*, 688 F.2d 1337 at 1351.

[19] As to the immediacy requirement Professor Davis offers the following:

> . . . a statement may be one of general policy, even though it is limited to past and present policy and says nothing about future or prospective policy.
>
> The trouble stems from the Attorney General's Manual (1947), which in a footnote at page 30 said: *'General statements of policy*—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.' That is all the Manual said; it did not say that a statement about policy which is general is not a general statement of policy if it is not prospective.

Davis Supp. § 7:5 at 170.

the general statement of policy exception. 607 F.2d at 701. The "substantial impact" test was used by the *Brown Express* court to determine whether a rule was "substantive" or "procedural," in order to determine whether the rule there at issue fell within a separate and distinct rulemaking exception. *Id.* at 702. *See* 5 U.S.C. § 553(b)(A) (rules of agency organization, procedure, or practice). *See also American Trucking* at 1351 (this court has never applied substantial impact test to interpretative rules though we did apply it to procedural rules in *Brown Express*). *But see American Trucking, supra* at 1351 (courts usually do not distinguish between § 553(b)(A) exceptions in applying substantial impact test). Further, our recent opinions call into question application of the substantial impact test to any rulemaking exception. *See id.* at 1352 & n. 20.[20]

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[20] In *American Trucking* Chief Judge Godbold stated "[t]here are significant theoretical difficulties in applying the substantial impact test, however, and therefore we avoid endorsement of it at this time." In a note to the first clause of that sentence he explains those theoretical difficulties, 688 F.2d at 1352 n. 20. We quote that footnote in its entirety:

> The substantial impact test is typically reasoned under two different theories: as a gloss on the statutory exception for "interpretative" rules, the *statute* requires notice and comment even though a rule is "interpretative" if it has substantial impact; as a judicially-created procedural requirement, notice and comment procedures are imposed *in addition to* the requirement of the APA if demanded by fundamental fairness. *See Davis Treatise, supra,* at § 7:18. The first theory has been criticized as unsound. *Id.*, 1982 Supplement at § 127 (criticizing *Brown Express, supra*); *Administrative Law of the Seventies, supra* at 193. The second theory is put in doubt by the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978), where it stated that courts may add on to the APA procedural requirements only in "extremely rare" or "extremely compelling" cases. *See Energy Resources Group, Inc. v. Department of Energy*, 589 F.2d 1082, 1096-98 (Emer.Ct.App. 1978) (holding that *Vermont Yankee* precludes substantial impact test); *Davis Treatise, supra,* at §§ 6:35-36, 7:19 and 1982 Supplement at 127-47 (attempting to write off the *Vermont Yankee* "dictum").
>
> In addition to the two principal theories it is also possible that the substantial impact test is not distinct from the initial determination of whether a rule is "interpretative" but is subsumed within this determination as a factor in determining whether a rule is "legislative." *See* discussion in text preceding note 11 *supra*. If this is the only role of the substantial impact test it has a much decreased significance, for as explained above the substantial impact of a rule is only one, weakly relevant consideration in the legislative rule determination. *Id.*

The enunciated criticisms apply equally here, perhaps more so because the third theoretical underpinning is entirely unjustified.

Despite acknowledgment of difficulties with the test, the *American Trucking* opinion assumes "*arguendo* that this approach is applicable" and that the rule in question does not have substantial impact. *Id.* We could do the same, *see Noel v. Chapman*, 508 F.2d 1023, 1030 (2nd Cir. 1975) ("so-called" substantial impact test not determinative of general statement of policy at issue because policy announcement only a guide for, but does not control discretion), but decline to extend precedent generally recognized to rest on a questionable foundation. Nor is it necessary for us to do so, because no precedent in this circuit applies the "substantial impact" test to general statements of policy. Instead, we set out in the text of this opinion the factor we believe the statute does mandate considering in identifying a general statement of policy.

We here conclude that the substantial impact test is insufficient to determine whether a rule is a general statement of policy. Policy statements often have a substantial impact, the more general, the more substantial. As Professor Davis notes, commenting upon the Second Circuit decision in *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975), discussed *infra*:

> Even if fairness to the aliens in the *Noel* case may have called for § 553 procedure before the INS changed the practice of the New York district director to the disadvantage of the aliens, still the element of seeming unfairness may stem much more

> from Congress than from the court, for § 553 does exempt "general statements of policy" from the procedural requirements and thereby authorizes the most crucial policy determinations to be made without the procedure of notice and written comments.

In all fairness to the district court, analyzing a rule within the general statement of policy exception is akin to wandering lost in the Serbonian Bog. *See Guardian Federal*, 589 F.2d at 668 (matters concerning application of exception to case not wholly free from doubt); *Noel v. Chapman*, 508 F.2d at 1030 (general statement of policy exception enshrouded in considerable smog); *Davis*, § 7.5 p. 32 (area confusing; perhaps only Congress can correct the confusion). The term itself—"general statement of policy"—offers little guidance. The new policy at issue was a "statement," was by its terms "general," and it was a matter of "policy," but if this were all the analysis required many more rules would qualify under the exception and fewer courts would find the area a morass. The legislative history offers little guidance. *See Davis* § 7.6, p. 32. The Supreme Court has yet to offer a definitive test. Courts that have addressed the issue present any number of ideas as to what constitutes a general statement of policy; the ideas often are intuitive, with little foundation in the statute or legislative history.

Given some of the confusion in this area we approach our analysis with basis principles concerning rulemaking. In *Guardian Federal* the District of Columbia Circuit set forth succinctly the benefits of notice and comment rulemaking:

> This public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions. Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation

> tends to promote acquiescence in the result even when objections remain as to substance.

589 F.2d at 662. The exceptions to the rulemaking requirement, on the other hand, come into play when the benefits of public rulemaking procedures are outweighed by other considerations, or when no benefits accrue to the use of the rulemaking procedures. The District of Columbia Circuit noted in *Guardian Federal* that the exceptions "accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, and reduction in expense. *Id.* at 662. Therefore, despite the preferential position of rulemaking in the APA, *see American Bus Association v. United States*, 627 F.2d 525, 528 & n.2 (D.C. Cir. 1980) (salutary effect of rulemaking procedures cannot be gainsaid; exceptions should be noted reluctantly), there are instances when Congress intended the balance to shift the other way.

In determining whether to apply a general statement of policy exception to a given rule one overriding factor frequently relied upon by courts addressing the issue strikes the balance enunciated above. That factor addresses the extent to which the challenged policy leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the general policy in an individual case. Often referred to as examining whether the policy establishes "a binding norm,"[21] the issue is whether the

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[21] *Guardian Federal, supra*, 589 F.2d at 666. At issue in *Guardian Federal* were regulations specifying the criterion that audits and auditors were required to fulfill in order to produce an audit satisfactory to the FSLIC. The *Guardian Federal* court held that the regulations at issue were within the general statement of policy exception, relying upon two familiar factors.

First, in enunciating the critical test of whether a rule was a general statement of policy the court stated: A general statement of policy does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed." 589 F.2d at 666 (quoting *Pacific Gas & Electric Co. v. FPC*, 506

policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion.[22] The significance of this factor is that it reveals whether, if objections to the rule cannot be voiced through notice and comment rulemaking at the time of promulgation, there will be a subsequent opportunity to object to a specific application of the rule. If an agency, or its official, is bound to apply an airtight rule in a given case it is important to allow specific objections

F.2d 33, 38 (1974)). Second, the District of Columbia Circuit found that the regulations at issue effectively preserved the Administrator's discretion. Although the regulation set forth criterion to be followed, the "Chief Examiner has discretion to accept a nonconforming audit report, or for that matter to prescribe additional requirements in a particular case," *id.* The court then stated the second test: "[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law." The test set forth in *Guardian Federal* is in large part the one we adopt. We have attempted, however, to develop the underlying rationale.

[22] *See Pinkus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974) (parole criteria so "narrow [decisionmaker's] field of vision that in effect they limit influence of any other factors); *Guardian Federal, supra*, 589 F.2d at 666 (general statement of policy must leave administrator free "to exercise his informed discretion in situations that arise"); *Parco v. Morris*, 426 F.Supp. 976, 985 (E.D. Pa. 1977) (not a general statement of policy when rule purports to grant discretion but has result of *all* cases being resolved in one manner). This case is unique to the extent that the statute being "filled in" by the policy statement has as a standard the "discretion" of the Attorney General. *See* 8 U.S.C. § 1182(d)(5)(A) (Attorney General may, in his discretion, parole aliens). Other cases express this concept of a "binding norm" differently, for example describing the alleged policy as 'imposing rights and obligations" on the party before the agency. *Texaco v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969) (waiver provision no substitute for informed discretion; rule at issue finally determines rights and obligations). The ultimate concern, however, is that the agency, despite its announced policy, be free to consider on their facts the cases that arise, without constraint of the "policy."

prior to promulgation, lest these objections be forfeited. If, however, a sufficiently general rule guides the agency's decision, but application of the rule to a unique set of facts is subject to challenge, prior opportunity to object is less important and the balance may mitigate against notice and comment rulemaking.[23]

Here, measuring the new policy by this standard, we find the balance is struck in favor of notice and comment rulemaking. We so hold because of the peculiar facts of this case. This is not a case where a policy was developed and announced at the highest level of government, and implemented in accord with that announcement. Those who formulated the policy failed to convey the policy to those responsible for implementing it. Left without guidance as to how to implement an undefined policy, the immigration inspectors enforced the detention policy as if it was intended to apply solely, and uniformly, to Haitians.

We are faced with the choice of analyzing either a policy ranking immigration officials insist they adopted, or one their subordinates believed they were responsible for implementing.[24] The latter presents the only sensible

[23] An example emphasizes this point. Consider the case of an fifty-year old undocumented male immigrant with a severe heart condition, examined in light of two possible formulations of a parole policy. Under the first hypothetical formulation INS determines it will detain all undocumented immigrants unless they are (1) under six years of age, (2) over 60 years of age, or (3) pregnant. Under the second formulation INS determines it will detain all undocumented immigrants unless there are "significant humanitarian reasons." The first formulation does not allow for discretionary relief from the general rule. Under the second formulation the standard—"significant humanitarian reasons"—is so broad that the agency official is free to grant relief.

[24] We presume the policy as applied by immigration inspectors was the policy they believed their superiors intended them to apply. We have no basis for believing the immigration inspectors responsible for implementing the new policy did so in a manner deliberately contrary to what their superiors required. What happened

approach. Though the genesis of discriminatory enforcement may have been only a failure to clarify a general policy, the reality is that "the absence of guidelines for detention and parole" accounted for "inconconsistencies between what the Government witnesses said the policy was and the policy their subordinates were carrying out." *Louis III* at 981 n.24. Those subordinates implemented a policy which led to widespread incarceration of the Haitians, humanitarian cases or otherwise.[25] A broad rule of detention with undefined exceptions is susceptible to rigid enforcement with no opportunity to avoid the rule's harsh results.[26] Such a rule cannot be a general statement of

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here strikes us as analogous to the children's game "telephone," where a child at the start of the line whispers a phrase in the ear of the child beside him, and so on down the line. Inevitably, the phrase uttered by the last child in line bears little resemblance to the original phrase. Here the Administration announced a policy in the most general of terms; without explicit instruction, however, that policy was implemented in a specific discriminatory manner. There is no evidence that the subordinates were instructed they were applying an unintended policy.

[25] The record indicates not all Haitians were denied parole. It is impossible to determine on the record, however, the basis for granting parole in some cases and denying it in others. Certainly it was not "humanitarian cases," *see supra* III, C, discussing failings of the evidence in this regard. To the extent grants of parole were arbitrary and unprincipled, the only identifiable "norm" was detention.

[26] The Administration announced a broad policy of detention. The announcement, made in the context of Haitian immigration, failed to set out guidelines for discretionary parole. It is unsurprising that the message received by immigration officials responsible for implementing the policy was to detain Haitians. *See* I, D *supra* for a full explication of the policy announcement.

We emphasize we are not analyzing the effect of a policy, i.e. its impact, substantial or otherwise. The procedures of the Administrative Procedure Act are without value if it cannot be determined at the time of announcement, whether or not a rule is within the general statement of policy exception. The inherent nature of the broad detention policy announced by the government,

policy; in truth it creates a binding norm.[27] Consequently, the general statement of policy exception is not applicable here. Because we conclude the new policy was not within any of the notice and comment rulemaking exceptions, we affirm the judgment of the district court as to Count II.

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with reference to Haitian immigration, was too readily susceptible to rigid discriminatory enforcement. This case is factually unique because the breadth of the new policy, a policy without guidelines for enforcement, accounted for its establishing a "binding norm."

[27] The government directs our attention to *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975). In *Noel* an INS statement limiting the discretion of the district director to grant the privilege of voluntary departure to deportable aliens was at issue. The New York district director of INS maintained a "more liberal" policy than the rest of the United States with respect to the suspension of deportation for illegal aliens married to permanent aliens. *Id.* at 1025. INS informed its district directors that, as of July 31, 1972, deportation dates should not be suspended except where compelling circumstances warranted the suspension. *Id.* The Second Circuit held that INS' announcement, the purpose of which was to bring New York into line with the rest of the country, fell within the general statement of policy exception to the rulemaking requirements of the APA. *Id.* at 1030-31.

The Second Circuit enunciated several factors that supported its determination. First, it stated: "We cannot conclude that the instructions at issue here change the existing right of the appellants to have their applications for extensions of time to depart authorized in the sole discretion of the District Director." 508 F.2d at 1030. Second, the *Noel* court relies upon a statement by Judge Friendly that " '[o]ne of the values of the policy statement [is] *the education of agency members in the agency's work,*' " *id.* at 1030 (emphasis in original). The *Noel* court distinguished between statements directed at staff to explain how to conduct discretionary functions, and statements directed at the public to impose obligations upon them.

This case is distinguishable from *Noel*. Although those who originally announced the new policy may have intended it not to limit discretion, and to serve only to educate agency officials, we find those responsible for establishing the policy failed to convey its general nature.

III. Equal Protection of the Law

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*
>
> *The Declaration of Independence (1776).*

Plaintiffs asserted below that the government violated their fifth amendment rights by enforcing its new policy in a discriminatory manner. The district court found the Haitians bore the brunt of the new policy to a degree greater than any other nationality at that time, *Louis III* at 1000, but concluded that "Defendants intended to be fair and that if another class of aliens arrived in this country in a situation similar to that of the Plaintiffs they would be treated in a similar fashion." *Id.* at 1001. Holding plaintiffs failed to meet their burden of proof on the discrimination issue, the district court ruled in favor of the government.

A. *General Principles*

1. *Alien's Rights*

The district court initially addressed the question whether excludable aliens could raise an equal protection claim. Comparing pre-exclusion parole to a criminal defendant's right to pre-trial bond, the district court determined that class members could seek protection under the fifth amendment from discriminatory exercises of the parole power. We agree.

As we discussed *supra*, the excludable alien knocking at our door has few constitutional rights when seeking admission to this country. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5, 73 S.Ct. 472, 477 n.5, 97 L.Ed. 576 (1953) (Bill of Rights futile authority for alien seeking admission for the first time). Congress, exercising

this nation's inherent rights of sovereignty, has plenary authority over the who and how of immigration—"[w]hatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned." *Mezei, supra*, 97 L.Ed. at 963, 345 U.S. at 212, 73 S.Ct. at 629.[28] Just this term the Supreme Court reaffirmed this position, stating "[t]his Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights *regarding his application*, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, —— U.S. —— at ——, 103 S.Ct. 321 at 329, 74 L.Ed.2d 21 (1982) (emphasis supplied).

At issue here, however, is not a right to admission and attendant procedures, but a right to be considered for parole in a non-discriminatory fashion. In this regard Judge Spellman noted "the [Supreme] Court has never held, . . . 'the Constitutional guarantees of the Fifth Amendment do not extend to unadmitted aliens.'" *Louis III* at 998. Indeed, as early as 1885 the Supreme Court, discussing the scope of the Fourteenth Amendment, stated:

> *The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.* It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' *These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality*; and the

[28] Relying on language in cases such as *Mezei*, the government argued below that excludable aliens have no fifth amendment rights to assert. The district court rejected this, as we note in our opinion, and the government does not specifically challenge that determination. In light of the import of the issue, however, we address the merits and affirm the determination of the district court.

> equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220, 226 (1886) (emphasis supplied).

The problem here is the fiction that excludable aliens are not within the "territorial limits" of the United States. Though that fiction serves its purpose to limit the procedural rights of an excludable alien "regarding his application" for admission, *Landon v. Plascencia, supra*, it strains credulity to maintain that an alien within our territorial limits may claim none of the rights accorded our citizens. And, indeed, in situations where excludable aliens within our borders have claimed deprivations of fundamental rights, the courts have been quick to respond. In *Rodriquez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), the Tenth Circuit held "punishment" of excludable aliens was improper without the "substantive and procedural due process guarantees of the Fifth Amendment." "Surely Congress could not order the killing of Rodriquez-Fernandez and others in his status on the ground that Cuba would not take them back and this country does not want them." *Id.* at 1387. And, in *United States v. Henry*, 604 F.2d 908 (5th Cir. 1979), the court held that an excludable alien is entitled to fifth amendment rights once criminal proceedings against him have commenced. *Id.* at 914. *See also Plyer v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 2391, 72 L.Ed. 2d 786 (1982) (whatever status is under immigration laws, undocumented alien is surely "person" in ordinary sense of word under fifth and fourteenth amendments) (deportable alien). *See generally* Note, *The Constitutional Rights of Excludable Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees*, 70 Geo. L.J. 1303 (1982).

Although the class members ultimately seek admission to this country, the present action does not "relate to admission and does not challenge Congress' power in that regard." *Louis III* at 34. In fact, though detention is

the underlying predicate of this action, class members do not even question the right of Congress or the Executive to detain them. Rather, they challenge the discretionary exercise of the Executive's parole power when that power is exercised on the basis of race or national origin. Accordingly this action falls within the rubric of such cases as *Yick Wo, Plyer, Henry* and *Rodriquez-Fernandez*, and differs from challenges to immigration procedures rejected in *Mezei* and *Knauff*.

Even were we unprepared to accord these aliens full equal protection rights we would be compelled to consider this discrimination claim. Our standard of review under *Mezei* and *Knauff* is to assure aliens receive that process Congress determined was due; on the record before us we can but determine that Congress intended the statutes under which the INS acted to be applied in a non-discriminatory fashion. This the district court explained:

> It is important to note that the actions challenged herein are *not* Congressional. Plaintiffs allege the Defendants are applying a neutral statute in a discriminatory fashion. This distinction, between legislation and enforcement, is critical. *Congress* can legitimately make distinctions among and against aliens that would be unacceptable if applied to citizens, *Matthews v. Diaz*, 426 U.S. 67, 80 [96 S.Ct. 1883, 1891, 48 L.Ed.2d 478] (1976), but "[i]n the *enforcement of these policies*, the Executive Branch of the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 530 [74 S.Ct. 737, 742, 98 L.Ed. 911] (1954) (Frankfurter, J.), cited in, *Faillo v. Bell*, 430 U.S. 787, 792 n. 4 [97 S.Ct. 1473, 1478 n. 4, 52 L.Ed.2d 50] (1977). (Emphasis added). "A statute, otherwise neutral in its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 [6 S.Ct. 1064, 1070, 30 L.Ed. 220] (1886)." *Washington v.*

Davis, 426 U.S. 229, 241 [96 S.Ct. 2040, 2048, 48 L.Ed.2d 597] (1976).

Louis III at 998-99.

2. *Proof of Discrimination: the legal standard*

In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) [hereinafter "*Arlington Heights*"] the Supreme Court held that plaintiffs challenging an action as discriminatory must go further than identifying a disparate impact and prove the challenged action was the product of discriminatory intent. 429 U.S. at 265, 97 S.Ct. at 563, 50 L.Ed.2d at 464; 426 U.S. at 240-42, 96 S.Ct. at 2047-49, 48 L.Ed.2d at 607-09. Recognizing that legislative and administrative actions are rarely motivated by one purpose only, the Court held plaintiffs must establish that the challenged decision was at least motivated in part by a discriminatory purpose. 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465. *See also Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Plaintiffs need not prove a discriminatory purpose was the primary, or dominant purpose, *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465, but must show that the action taken was, at least in part, "because of," and not merely "in spite of" its adverse effects upon an identifiable group, *Feeney, supra*, 442 U.S. at 279 & n. 24, 99 S.Ct. at 2296 & n. 24.

The very nature of legislative and administrative action makes it difficult to ascertain the "intent" of the acting body. For that reason, in *Arlington Heights* the Supreme Court provided some examples of "circumstantial and direct evidence" that courts might properly consider in judging whether invidious discrimination permeated official action. First, there is evidence of "impact," i.e. whether the challenged activity "bears more heavily on one race than another," *id.* 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465, *citing Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597, 608.[29] In cases where proof of impact alone is insufficient, where a stark pattern of discrimination is not evident, the courts should consider circumstantial evidence, which includes the following factors: (1) historical background of the decision, (2) the specific sequence of events leading up to the challenged decision, (3) departures from the normal procedural sequence, as well as substantive departures, and (4) legislative or administrative history. 429 U.S. at 265-66, 97 S.Ct. at 563, 50 L.Ed.2d at 464-66. And, because these factors are not exhaustive, *id.* 429 U.S. at 266, 97 S.Ct. at 564, 50 L. Ed.2d at 466, the list has been supplemented: (5) foreseeability of discriminatory impact, *Columbus Board of Education v. Penick*, 443 U.S. 449, 464-65, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979), (6) knowledge of discriminatory impact, *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1048 (6th Cir. 1977), *cert. denied*, 434 U.S. 997, 98 S.Ct. 635, 54 L.Ed.2d 491 (1979), and (7) the availability of less discriminatory alternatives, *United States v. Board of School Commissioners of Indianapolis*, 573 F.2d 400, 413 (7th Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978).

Once plaintiffs come forward with evidence sufficient to support a *prima facie* claim the burden shifts to the defendant, the government in this case, "to dispel the inference of intentional discrimination." *Castaneda v.*

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[29] A claim of discrimination based on nationality does not differ from that based on race. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.E.2d 498 (1976) (Mexican-Americans); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese). Plaintiffs consistently have addressed this case as one premised both on nationality (Haitian) and race (black). The bulk of the evidence, however, was addressed to the nationality claim.

Partida, 430 U.S. 482, 497, 97 S.Ct. 1272, 1282, 51 L. Ed.2d 498, 512 (1977); *Castaneda v. Pickard*, 648 F.2d 989, 1003-04 (5th Cir. 1981). Although the quantum of evidence required from the defendant is unclear from the Supreme Court's decisions it is established that mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut the prima facie case.[30] *Castaneda*, 430 U.S. at 499 n. 19, 97 S.Ct. at 1282 n. 19, 51 L.Ed.2d at 513 n. 19 (cases cited). A defendant must introduce evidence to support its explanations. *Castaneda*, 430 U.S. at 499 n. 19, 97 S.Ct. at 1282 n. 19, 51 L.Ed.2d at 513 n. 19. *Cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 9, 101 S.Ct. 1089, 1094 n. 9, 67 L.Ed.2d 207, 216 n. 9 (1981).

Finally, should the government succeed in rebutting plaintiffs' prima facie case, the trial judge must evaluate the weight of the evidence. It is inevitably the task of the trier of fact to decide whether plaintiffs have succeeded, in the face of the defendant's rebuttal, in proving, by a preponderance of the evidence, that defendant's actions were taken in part because of a discriminatory intent or purpose. *Cf. Burdine*, 450 U.S. at 252-53, 101 S.Ct. at 1093.

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[30] In this portion of our opinion we rely upon a number of Title VII cases. Although the standard of proof in Title VII cases differs from that in constitutional equal protection cases, the framework for proving a case, *i.e.* prima facie case, rebuttal, ultimate proof, is the same. *See, e.g., Castaneda v. Partida*, 430 U.S. at 495-96, 496, 97 S.Ct. at 1280-81, 51 L.Ed.2d at 508, 511 (establishing prima facie case requiring rebuttal in jury discrimination case). Because of the similar framework, and because there are few equal protection cases relying on statistics, when appropriate we draw upon Title VII cases. *E.g., Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 424 (5th Cir. 1980) (rebuttal includes existence of "legitimate nondiscriminatory reason" for defendant's action, or evidence of "total unacceptability of plaintiff's statistical evidence"), *vacated and remanded*, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981), *modified in part, rev'd in part*, 657 F.2d 750 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982).

3. *The District Court's Findings*

We cannot determine precisely what the district court concluded as to the individual aspects of prima facie case, rebuttal, and ultimate proof. From the absence of any discussion of rebuttal it might appear the court below found insufficient proof to establish a prima facie case. We conclude differently, however, for the district court considered government arguments that are properly considered as rebuttal, if at all.

The government's case rested on two independent general arguments. The first attacked the validity of plaintiff's statistical evidence, and the second proffered explanations to dispel the appearance of disparate impact. Both government arguments are considered properly as rebuttal. *See Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 4214 (5th Cir. 1980) (rebuttal includes existence of "legitimate nondiscriminatory reason for defendant's action, or evidence of "total unacceptability of plaintiff's statistical evidence"), *vacated and remanded*, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981), *modified in part, rev'd in part*, 657 F.2d 750 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982).

The prima facie case, however, is based solely on evidence presented by the plaintiff, and is evaluated to determine whether plaintiff could survive a motion to dismiss at the close of its case. *See Burdine*, 450 U.S. at 253-55, 101 S.Ct. at 1093-95, 67 L.Ed.2d at 215-16 (Title VII); *cf. Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (prima facie showing of personal jurisdiction established on basis of plaintiff's affidavits and materials); *White v. Abrams*, 495 F.2d 724, 729 (9th Cir. 1974) (prima facie case is sufficient evidence for plaintiff to survive motion to dismiss or motion for directed verdict; plaintiff must present evidence sufficient to require defendant to present its case); *Warner v. Ke-Wanee Machinery & Conveyor Co.*, 411 F.2d 1060, 1063 (6th Cir. 1969) (prima facie case evaluated to see if

plaintiff's evidence raises issue for jury). We are convinced that if the prima facie case were segregated from rebuttal and ultimate proof the district judge would conclude, as we do, that this preliminary burden was met. The statistical evidence presented by plaintiffs, *see infra*, disclosed a stark pattern of discrimination. We are not overly concerned at this juncture, however, with the district court's failure to separate preliminary and final burdens. It may have been impossible to categorize the evidence, as was the case in *Equal Employment Opportunity Commission v. Datapoint Corp.*, 570 F.2d 1264, 1268 (5th Cir. 1978), where we noted:

> However, in this case the failure of the trial court to expressly make such determination is not material as plaintiff's proof and defendant's rebuttal are completely interwoven. In this case the very statistics relied upon by plaintiff to establish a *prima facie* case formed the basis of defendant's rebuttal of it, i.e. that the statistics were not reliable.

Further, the district court correctly identified the ultimate burden upon the plaintiff, to prove intentional discrimination by a preponderance of the evidence. *Cf. Burdine*, 450 U.S. at 252-53, 101 S.Ct. at 1093. The district court concluded plaintiffs failed to meet this burden.

Although concurring in the proper legal standard, we disagree with the district court on a plethora of subsidiary issues. Specifically, once we examine the conclusions made by the court below as to the government's arguments, it is apparent as a matter of fact and law that the government failed to rebut plaintiff's evidence of discrimination. Accordingly, we proceed to consider those issues in dispute.

B. *Plaintiff's Case*

1. *"Impact"*—The Statistical Evidence

At trial plaintiffs introduced a wealth of statistical evidence to show the vastly disproportionate impact of the government's detention policy on Haitian, as opposed to

non-Haitian, immigrants. *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465; *Castaneda v. Partida*, 430 U.S. at 494-96, 97 S.Ct. at 1280-81, 51 L.Ed.2d at 510-11. Additional statistical evidence from a New York case, *Bertrand v. Sava*, 684 F.2d 204 (2d. Cir. 1982), was introduced to show that certain factors suggested by the government to explain the disparate impact, such as family ties or documentation, bore little relation to chance of parole.[31] Plaintiffs then offered the testimony of Dr. Howard Seth Gitlow, Professor of Statistics, to explain the statistical significance of the data.

The test here employed is not so confusing as the parties make it appear, nor is it unfamiliar in cases of this nature. *See Castaneda v. Partida*, 430 U.S. at 496-97 n. 17, 97 S.Ct. at 1281 n.17, 51 L.Ed.2d at 512 n.17 (application of standard deviation analysis). Dr. Gitlow employed binomial analysis to statistics showing Haitians versus non-Haitians detained and paroled. The purpose of this test is to show how many Haitians one would expect to find detained or paroled based upon the government's treatment of non-Haitians.[32]

The standard deviation, a final expression of binomial analysis, is nothing more than a measure of the difference between the predicted number and the actual number. "As

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[31] The government objected to the evidence from *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982), and the opinion below, on the grounds that the populations compared to prove discrimination were not comparable. Plaintiffs introduced evidence, however, to refute government arguments concerning relevant factors in a parole determination. In this regard the Second Circuit's reversal of the district court in *Bertrand v. Sava* supports, rather than harms, the plaintiffs' case. *See* discussion *infra* at 1498-1499.

[32] Binomial analysis takes the number of non-Haitians paroled out of a given universe, computes this as a percentage, multiplies that percentage with the total Haitians in the universe and compares this final number with the Haitians actually paroled. When those numbers differ it raises the presumption that a non-random factor, in this case discriminatory intent, was at work in determining who should be detained or paroled.

a general rule for [] large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," then we suspect an unexplained factor, in this case discrimination, is responsible for the difference. *See Castaneda v. Partida*, 430 U.S. at 496-97 n.17, 97 S.Ct. at 1281 n.17, 51 L.Ed.2d at 512 n.17.

The statistical evidence offered by plaintiffs and analyzed by Dr. Gitlow came from three specific sources. The first source was the secondary inspection logs at the airport in Miami between August 1981 and April 1982. Secondary inspection occurs if upon initial encounter with an Immigration officer there is some doubt as to an individual's right to enter. For comparison this evidence was compiled in two separate time frames. Plaintiff's exhibit 187 reflected secondary inspection between August and December, 1981, and separated the statistics for both Haitians and non-Haitians into "paroled," "paroled for exclusionary hearing," "deferred inspection" and "detained."

Dr. Gitlow then testified concerning the binomial analysis performed with the statistics. He computed standard deviations based on three separate compilations, each collapsing the parole categories in a different way in order to ensure no method more accurate than another was neglected. Dr. Gitlow found in each of the three compilations that the chance of so many more Haitians than non-Haitians being detained or so many fewer Haitians paroled was "on the order of less than two in ten billion times." 53 Tr. 2948. In some cases it was "far less than one in ten billion," *id.* at 2949, or "a statistical joke." *Id.* at 2950.

The second set of data, provided by the government was from INS District VI, which encompasses the south Florida region. The data reflected persons placed in exclusion proceedings or in an exclusion category who sought entry between the period August 1, 1981 and November 1, 1981. The data was coded by nationality, documentation, attempted entry, date of parole, length of detention, whether

an asylum claim was filed, family ties, and comments. *See* Px 189.

Dr. Gitlow provided binomial analysis on a number of compilations of the District VI data.[33] Plaintiffs also built "worst-case scenarios" in which they progressively biased the figures in favor of the government.[34] The purpose of the extensive analysis of the District VI data was to evaluate not only detention versus parole, but also length of time in detention prior to release or final determination. Dr. Gitlow again could only explain the disparate impact of the new policy in a random world as "remote," statistically significant," or a "statistical joke." *See* 53 Tr. 2951-68. In all of these cases Dr. Gitlow declined to calculate the standard deviation because "it would be so large that my calculator would not hold the numbers." *See e.g.*, 53 Tr. 2965.

Because the government contended, as we discuss *infra*, that the statistical evidence failed to take into account certain "significant" factors, Dr. Gitlow next performed multivariate, or Chi-squared, analysis on the District VI data to control for one of those "significant" factors, that being documentation status. Out of the twenty or more different tests performed only one result fell outside the

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[33] For example, in one case aliens turned over to the Federal Drug Enforcement Administration might be excluded from the analysis, and in another they might be treated as detained. *See* 53 Tr. 2964-65.

[34] Despite the government's continuing objection to characterization of data compilation as "favoring the Government," *e.g.*, 53 Tr. 2929, 3022, plaintiffs' representations to this effect obviously were correct. For example, if any non-Haitian's status was doubtful, but plaintiffs counted them as "detained," as a matter of simple mathematics it skewed the results in favor of the government; likewise if a Haitian's status was doubtful, but he was counted as paroled. One dramatic example of this procedure was when Dr. Gitlow added in as detained all non-Haitians who withdrew or were paroled to DEA or the U.S. Marshal. Compare Px. 191, table 4 *with* table 5. The effect of including these questionable cases was a drop from 49.2 to 20.35 standard deviations.

"suspect" levels of *Castaneda v. Partida*, while most standard deviations were twenty or greater.[35]

The third data set examined was from the government's computer system at Krome North. This data covered detention and parole for a period between January and April 1982. Plaintiffs introduced this evidence with "strong reservations with respect to the data," 53 Tr. 3040, because they never saw the underlying figures and were aware the computer did not include the entire relevant population. Nonetheless, the lowest standard deviation calculated by Dr. Gitlow was 7.64, well outside of the *Castaneda* "two or three standard deviations" range.

Finally, Dr. Gitlow analyzed statistics introduced by the government. During the course of the government's testimony, plaintiffs raised serious questions as to the validity of that data. *E.g.*, 54 Tr. 3176-78. Nevertheless, Dr. Gitlow's testimony concerning the statistics was every bit, if not more, damaging than his testimony concerning plaintiffs' statistics. *See* 54 Tr. 3251 et seq.

Plaintiffs' statistical evidence showed a severely disproportionate impact upon the plaintiff class. We venture

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[35] Standard deviation is an expression that measures an exponential deviation. Therefore, the difference between 2 and 3 standard deviations, let alone between 2 and 20, is much more significant than it would seem to an uninformed reader. Dr. Gitlow explained at trial:

> I would just like to demonstrate if there are more than three standard deviations above the mean, what the likelihood is and then I will calculate it at four, and that will explain it better than I can explain it.
>
> The chances of being greater than the three standard deviations are about one in a thousand. The chances of being the four standard deviations above the mean is about three in a hundred thousand. So, the one in a thousand versus three in a hundred thousand and when I go out to five, [sic] it is not much different between five and ten standard deviations. It is just all remote.

53 Tr. 2988.

to say that this impact revealed a "pattern [of discrimination based on nationality] as stark as that in *Gomillion* [*v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960);] or *Yick Wo* [*v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)]." *Arlington Heights*, 50 L.Ed.2d at 465. Despite the fact that this alone establishes a prima facie showing of discriminatory intent, *see id.* (impact alone will suffice to prove prima facie case when pattern that emerges is stark), plaintiffs also introduced considerable evidence of other *Arlington Heights* factors.

2. *"Other Evidence"*

In addition to the statistical evidence plaintiffs introduced a plethora of "other evidence" of discriminatory intent, as permitted under *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465-66. The district court's opinion described nine categories of admissible evidence relevant to discriminatory purpose, *Louis III* at 999-1000, but of these the court evaluated only two: historical background and departure from the normal procedures. The court found no substance to plaintiffs' contentions as to either of these categories. Plaintiffs cite this as error, urging that we hold the findings clearly erroneous, and recognize the other evidence under *Arlington Heights*.

Plaintiffs point to record evidence under three particular *Arlington Heights* factors: historical background, procedural and substantive departures, and administrative history. Although it is not readily discernible from a reading of *Arlington Heights* and the cases cited therein what evidence is pertinent to each factor, the evidence generally is valuable if it establishes an ongoing *pattern* of discrimination against the plaintiff class. 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465. We hold the district court erroneously disregarded evidence of these factors.

Under the "historical background" factor, plaintiffs introduced evidence of numerous lawsuits initiated in the

past to challenge disparate treatment of Haitian immigrants. *See Sannon v. United States*, 427 F.Supp. 1270 (S.D. Fla. 1977) (political asylum claims in exclusion as opposed to deportation hearing); *vacated and remanded without opinion*, 566 F.2d 104 (5th Cir.), *vacated as moot*, 631 F.2d 1247 (5th Cir. 1978) (INS' newly promulgated regulations offer same relief as that ordered by district judge); *National Council of Churches v. Egan*, No. 79-2959-CIV-WMH (S.D. Fla. Aug. 29, 1979) (Haitians work authorizations); *Haitian Refugee Center v. Smith, supra* (asylum claims of deportable aliens); *Louis v. Meissner*, 530 F.Supp. 924 (S.D. Fla. 1981) (*Louis I*) (access to counsel, fair hearings, erroneous deportation).

Further, the testimony of numerous witnesses, including well-regarded members of the immigration bar and former high-ranking INS and Department of Justice officials, attested to persistent targeting and mistreatment of Haitian immigrants. *See* Px 109A (memorandum from David Yeres, Deputy Associate Attorney General to David Crosland, General Counsel, INS) (8 May 1979) ("we should strive to end the double standard that now seems to prevail between the handling of these Haitian [work authorization] claims and those made by others"); testimony of Charles Gordon (former General Counsel, INS, and recognized immigration expert) 38 Tr. 140, 157-58 (mass hearings); testimony of Monsignor Walsh (Administrator, Catholic Relief Agency and refugee expert) 38 Tr. 260-64 (discriminatory policy re: asylum claims of Haitians); Testimony of Sam Bernsen (former General Counsel, INS) 38 Tr. 216 (special detention and release policy toward Haitians prior to 1977); testimony of Ira Gollobin (immigration lawyer; counsel to National Council of Churches) 40 Tr. 646 et seq. (history of NCC struggle with government to ensure fair treatment of Haitians); testimony of Maurice Ferre (Mayor of the City of Miami) 41 Tr. 787, 789, 795-96 (discussions with Administration officials over course of time concerning disparate treatment of Haitians and Cubans; resolution

of Miami City Council urging end to disparate treatment); testimony of Larry Mahoney (Public Affairs Officer, U.S. Department of State, Cuban-Haitian Task Force, July 1980 to May 1981) 43 Tr. 1140-43, 1148-50, 1168 (disparate treatment of Cubans and Haitians in camps; telephones for Cubans, Cubans had recreation facilities, left camp for threatre, parents remained with minor children—not true of Haitians); testimony of Jacqueline Rowe (Equal Opportunity Officer for Community Action Agency of Metro-Dade County) 44 Tr. 1355-72, 1385 et seq. (differing arrival procedures for Cubans and Haitians).[36] All told, this unrebutted and

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[36] One portion of Ms. Rowe's testimony is telling of the treatment to which Haitians historically were subjected. These events occurred in early autumn 1980:

> "As I mentioned, there was a young man on that particular day whose story seemed to indicate that he needed to fill out a form for political asylum. And because that could not be done by the INS officer at the Miramar site, I accompanied him to the INS site on Southwest First Street.
>
> . . . .
>
> "We went inside the building from the Southwest First Street entrance. There was a sign that said, Haitians to the rear, and I did not really quite understand.
>
> "I took the elevator upstairs. There was no rear—
>
> Q. Was that in English or in Creole, the sign?
>
> A. "It was in English. I went up to the second floor of the building with the young man. I was told what that meant was that I had to go out of the front of the building and walk around to the back of the building and stand outside in line.
>
> "Now, first I was concerned about it because right where I was there were INS officers and there were Cubans and they had some questions and they were given a number and I took a number and I went up to the desk and I said—I told them what my story was, and they said you have to go outside of the building. You stand in line outside the building and somebody will help, come out there to help you.
>
> "I did go back outside. . . .
>
> "[T]here were a group of 150, maybe 200 Haitian refugees who were standing in line outside in the sun. It was in the

unexplained testimony shows an historical pattern of discrimination under *Arlington Heights*.

The district court's discussion of this factor displays a misapprehension as to its purpose.[37] The court rejected

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middle of the summer and it was hot and they stood. They just stood.

"And I stood, too, for a while with the young man, but I really did not have much time. There was no INS officer, no staff out there.

"So, after standing there for a while, I went back inside the building to tell them that if I was supposed to be standing outside waiting for somebody in the back of the building [sic].

"There was, in the building, there was a stairway that led to the back door of the building, and we were told to stand on the stairway and wait. I went back inside to tell them there is nobody out there and when I went back inside, I opened the door to go in and two INS staff people—oh, I was not the only one there. There was a group of people there, and they were pushing us all down, you know, that kind of treatment. I mean, really, that's what happened to us.

"By that time I said to the INS officer, "What are you doing? I think this is archaic."

"And he said, 'Oh, I'm sorry,' as if to say, 'Oh, well, you speak English.'

"He said, "I'm sorry, what are you here for?'

"And I explained to him why I was there. And he said:

" 'Let me take the name of the young man who you are with and I will come out and I will call you.'

"So we went back to the first floor out around the back, stood again outside with these other couple of hundred people out there, some with babies, sitting on the stoop.

"There were no bushes, it was sun, and mothers, you know, with babies, and children and there were just people all over and nobody came out.

"And I eventually just left and reported back to the INS Deputy Director, who at that time, I believe, was Mr. Galudge (phonetic)."

44 Tr. 1384-87.

[37] The district court's misunderstanding of this factor had an impact upon the trial itself. Ira Gollobin, counsel to the National Council of Churches, was testifying to that organization's struggle

the evidence of prior cases stating "[p]laintiffs believe, and would like this Court to conclude, that the practices challenged herein are a mere continuation of the prior INS policy against excludable instead of deportable Haitians." *Louis III* at 1001. Rather, the judge found the practices were a result of the "increased flow of Haitians to South Florida during the years 1977 to 1980 and by the massive influx of Cubans during the boatlift in 1980." [38] The issue, however, is not whether this is a continuation of a former policy, but whether plaintiffs are able to introduce sufficient evidence of past discrimination against the class to support an inference that the current disparate impact too is a result of discriminatory intent. *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465 (historical evidence rele-

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over a number of years to obtain equal treatment for the Haitians. He testified concerning a period of ten years prior to this litigation, concentrating on the period prior to the Settlement agreement entered into between the Government and the Council in 1977. This string of ten years during which Mr. Gollobin could testify to persistent mistreatment was obviously relevant under the historical background factor of *Arlington Heights*. Nevertheless, the district judge cut short the testimony concerning events in 1973 saying: "Let's not make it too historical. We are talking about nine years ago. Let's not get into too much detail and move forward." 40 Tr. 646. This is the sort of evidence ignored by the district court in its opinion, yet the citation of authority by the Supreme Court in *Arlington Heights* indicates a ten-year period may well be relevant. *See Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465, *citing Griffin v. School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) (detailing racial discrimination over ten-year period).

[38] The first reason, the "increased flow" is, of course, unsupported by the evidence. As we note throughout the opinion, the Haitian flow was not more than 2% of the illegal immigration flow, yet the government failed altogether to introduce evidence of similar procedures used on non-Haitian immigrants. The second reason, "the massive influx of Cubans," is irrelevant to this litigation, though we perceive one underlying message of the entire litigation is that the Haitians were treated as they were as a result of the sudden Cuban migration during the Mariel boatlift.

vant particularly if it "reveals series of official actions taken for invidious purpose"). There is certainly sufficient unrebutted testimony to support such an inference in this case. In misapprehending the purpose of historical background, the district court failed properly to credit this evidence.

Departure from the normal procedural sequence may refer to the administrative sequence for formulating policy, or it may refer to the procedural sequence of exclusion adjudication to which plaintiff class members were subject.[39] In this case the latter surely permits an inference of discriminatory intent. Plaintiffs introduced evidence to describe numerous departures from the normal exclusion procedure described heretofore. Plaintiffs were served with I-122's[40] before they could present asylum claims to the District Director, *infra*, at 1507-1508, were subject to mass exclusion hearings behind closed doors, were found excludable in hearings in which the translators failed to translate Creole properly, *see supra* at 5, and in some instances were deported in a manner INS itself admits was faulty. *See generally Louis I*, 530 F.Supp. 924, *passim*. This evidence also was largely unrebutted and at least in one instance INS conceded its error. *Id.*

[39] The *Arlington Heights* opinion does not elucidate upon which of these properly are considered, stating only "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." 429 U.S. at 268, 97 S.Ct. at 565, 50 L.Ed.2d at 466. We believe evidence of either departure from standard adjudication procedures *or* administrative decision-making might permit an inference of discrimination, but it is the former that is more significant in this case. To the extent that immigration was a problem of national dimensions, it was not unusual for the Executive Branch deal with it in a unique way, and this alone would not suggest discriminatory intent toward the Haitians.

[40] An I-122 is the notice served upon an alien requiring him to appear for an exclusion hearing. Once the alien is served with an I-122 there may be no further "extra-judicial" contact between INS and the alien, thereby foreclosing an application for asylum before the district director.

The district court, however, disregarded this evidence. It stated "[p]laintiffs were subjected to these new procedures but they were not alone." *Louis III* at 1001-02. This conclusion is clearly erroneous. Outside of "*mere* protestation" INS introduced no evidence that any group other than the Haitians was subjected to these questionable practices. Not surprisingly, the government points to no such rebuttal evidence in its brief.

The district court also ignored evidence under the factor plaintiffs refer to as "procedural sequence" of the administrative process formulating the Haitian policy. This evidence is relevant, although it more properly is considered under the *Arlington Heights* factor "administrative history," (both before and after adoption of the new policy). We find no fault with a Presidential Task Force to deal with problems of national import such as immigration; we are concerned with the pages of documents acquired by plaintiffs in discovery that indicate a special discriminatory "Haitian Program."

The import of these documents is dependent upon reading them in context. First, it is helpful to note the INS code number for Haitians. Some documents do not specifically mention Haitians but merely assign the document by code to the Haitian file. The code number is CO 243.85. It appears on a variety of documents alarming as to both their number and content. *See e.g.*, Px 80 "Report as to status of space for detention and prior surveys" (David Crosland, General Counsel INS to David Hiller, Special Assistant to the Attorney General, 19 May 1981); Px 86 "Contingency Plan for the Detention of Cubans/Haitians in Florida and Other Locations" (Hugh J. Brian, Acting Assoc. Comm'r., Enforcement to Doris Meissner, Deputy Commissioner, 27 April 1981) (specifically referring to eliminating the right to apply for asylum to the District Director); Px 92 "Cuban/Haitian Policy" (Crosland to Hiller, 2 April 1981) (detention of Haitians and Cubans); Px 94 "Haitian Policy" (Crosland to Kenneth Starr, Counselor to the Attorney

General, 20 March 1981) (deprive right of asylum before District Director; detention for Haitians despite fact appeal process could extend over one year).

Second, it is helpful to bear in mind the "protestations" of INS officials, discussed more fully, *infra*, that the policy was intended to be applied "across the boards," but had its greatest impact on Haitians because no one else was "similarly situated." Plaintiffs' documents belie this. *See, e.g.*, Px 71a "Memorandum on President's Task Force" (Hiller to Task Force, 19 May 1981) (annual illegal inflow estimated at 500,000; Mexicans account for about 80% of total); Px 71b Issue Paper, "What Policy should the United States adopt with regard to foreign persons who enter South Florida without visas?" (same; Haitians account for "probably less than two percent"); Px 93 "Detention Policy . . . Cubans . . . and Haitians" (Nelson, Phillip Hawkes, Director, Office of Refugee Resettlement, INS to Guiliani, 15 December 1981) (drastic drop in Haitians compared to 1980).

Third, the government consistently argued against judicial interference with its uniform policy adopted by the President in the summer of 1981. Yet, plaintiffs' documents show the efforts and practices here at issue were instigated some time before that. The initial administrative discussions also seem to indicate a target identified previously to the summer of 1981. *See e.g.*, Px 77e "Processing of Haitian Cases in Miami District" (Charles Sava, Associate Comm'r, Enforcement to Mario Noto, Deputy Comm'r, 14 July 1978) (most effective deterrent to immigration is expulsion of Haitians in the country; Enforcement to take the lead in getting hearings moving swiftly); Px 77d "Haitian Program" (Richard Gullage, Acting District Director, Miami to All Employees, 23 August 1978) (Haitian cases cannot be delayed in any way; staff to take whatever action necessary to keep cases moving); Px 77b "Haitian Undocumented Aliens" (Note to Castillo, Commissioner, INS 20 July 1978) ("If, in accordance with policies to be established, the Haitians may be amenable to detention, . . .").

Finally, there are the documents that indicate the understanding of at least some Administration officials that the new policy was not to be applied universally. The best example of this is Plaintiffs' Exhibit #1, a Telex from the Regional Commissioner, Dallas to INS District Director, New Orleans, INS Associate Commissioner for Enforcement, and INS Associate Commissioner for Detention and Deportation, on September 2, 1981:

> PRIORITY
>
> BE ADVISED CURRENT SERVICE POLICY AND SOUTHERN REGION POLICY RE (HAITIANS) APPLICANTS FOR ADMISSION/ASYLUM REQUIRE THEY BE DETAINED PER I & NA 235 (B) AND 8 CFR 235.3(B).

(parenthetical in original).

All told plaintiffs mustered an impressive array of witnesses and an equally impressive number of documents to demonstrate circumstantially, and to an extent, directly, intentional government discrimination against Haitians. This evidence, in addition to the statistical evidence, was unrebutted but for the government's testimonial evidence, which can at best be termed "mere protestation." Without evidence of similar mistreatment of other immigrant groups, the district court had no factual basis for finding these practices were directed at others, or that they would be directed to others who were similarly situated. Based on the lack of evidence, the district court's findings are clearly erroneous.

C. *The Government's Case*

1. *Methodological Challenge—The Statistical Evidence*

By way of rebuttal the government challenged the methodology employed by plaintiffs to prove impact. The

essence of the government's claim was, and is, that binomial analysis is inappropriate to prove impact because parole is not a random process. The district court accepted this argument, disregarding the impact demonstrated by the statistical evidence, stating "parole is not a random process and the probability of parole is not the same for every person," *Louis III* at 983. For an abundance of reasons we uphold the methodological validity of plaintiffs' statistical analysis.

The Supreme Court has recognized the validity and value of statistical analysis in cases of this sort. "[O]ur cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *Teamsters v. United States*, 431 U.S. 324, 338-39, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396, 417 (1977) (citation omitted). The government generally concurs but argues this case differs from the traditional discrimination case employing statistics such as a jury selection case, because in a jury case selection of a jury is a random process whereas parole from detention is not.

Despite the fact that the government fails to articulate cogently its objection to the use of binomial analysis in a non-random situation, we understand the theoretical difficulties. As we explained, *supra*, binomial analysis compares a result expected in a random world with what actually occurred and then presumes some unspecified force is at work if the actual result differs significantly from the expected result (measured by the standard deviation). In discrimination cases the inference is that intentional discrimination is this "unspecified force." The government contends such analysis is inappropriate to this case, however, because parole is not a random process. It argues the deviation between expected numbers of Haitians detained or paroled from what is actually occurring could be explained in any number of ways other than intentional discrimination. Specifically,

the government argues parole depends on a number of finely-tuned factors or "qualifications," and the disparity in numbers of Haitians and non-Haitians incarcerated is accounted for on the grounds that the Haitians do not qualify under the parole standards. For seven different reasons, the government's argument fails to measure up under either the law or the facts of this case.

The first problem with the government's position is that Supreme Court has relied on statistical evidence in situations not wholly random. Although the government offers jury selection as the epitome of randomness the fact is that the selection method at issue in *Castaneda v. Partida* was not a random one. The Supreme Court in *Castaneda* acknowledged that the "key-man" jury selection system at issue was "highly subjective." *Castaneda v. Partida*, 430 U.S. at 497, 97 S.Ct. at 1281, 51 L.Ed.2d at 512.[41] Nonetheless, the case was decided primarily on the basis of statistics analogous to the ones before us. *Id.*, at 495-97, 500, 97 S.Ct. at 1280-81, 1283, 51 L.Ed.2d at 511-12, 514. The Supreme Court likewise has accepted binomial analysis in employment discrimination cases where it is undisputed that a lack of qualified plaintiffs may explain statistical disparities as well as an inference of discrimination on the part of the employer. For example, in *Teamsters v. United States*, 431

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[41] Under Texas' "key-man" grand jury system the jury commissioners select 15-20 people to comprise the list from which the grand jury is chosen. 430 U.S. at 485, 97 S.Ct. at 1275, 51 L.Ed.2d at 504. Those chosen then appear in court to have their "statutory qualifications" tested. *Id.* at 485, 97 S.Ct. at 1275, 51 L.Ed.2d at 504-05. Significant to the decision in *Castaneda* is the fact that absent testimony from the commissioners as to the qualification they employ in choosing their list it is impossible to know the basis on which that list is chosen. *Id.* at 499, 97 S.Ct. at 1282, 51 L.Ed.2d at 513. As we hold, *infra*, a similar situation is present here. Although qualifications for parole may exist we cannot discern them absent uniform testimony from those individuals responsible for parole policy or implementation explaining what relevant qualifications are examined.

U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), the Court relied on statistical evidence of disparities between minorities in the population-at-large and minorities employed as drivers as evidence of discrimination. *Id.* at 338-41, 97 S.Ct. at 1856-57, 52 L.Ed.2d at 417-19. Although qualifications were not generally at issue in *Teamsters*, petitioners did not raise qualification arguments similar to those the government advanced here. *Id.* at 342 n. 23, 97 S.Ct. at 1858 n. 23, 52 L.Ed.2d 419 n. 23. In response the Court stated:

> In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from "the inexorable zero."

Id. (citation omitted).

This is not to say the Supreme Court has ignored the question of qualifications when using binomial analysis; quite the contrary is true. The Court has had occasion to note that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population . . . may have little probative value." *Hazelwood School District v. United States*, 433 U.S. 299, 307, n. 13, 97 S.Ct. 2736, 2742, n. 13, 53 L.Ed.2d 768, 777 n. 13 (1977). Here, however, the government altogether ignored the body of jurisprudence concerning proof of, and analysis of, special qualifications while blindly asserting binomial analysis is never appropriate in a non-random situation. That is certainly not the case.

Second, we emphasize that plaintiffs may prove a prima facie case without accounting for qualifications when the statistical impact is sufficiently glaring. This we established in *Fisher v. Procter & Gamble Manufacturing Co.*, 613 F.2d 527 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115, 101 S.Ct. 929, 66 L.Ed.2d 845 (1981):

> Mindful of [the admonition in] *Hazelwood* [concerning proof of special qualification], we nevertheless find the plaintiff's statistics adequate to establish a prima facie case. First, a prima facie case may be shown without evidence of qualifications where the inference of discrimination is supported by a compelling level of racial underrepresentation in a sizeable work force. In *Hayes International Corp.*, [456 F.2d 112 (5th Cir. 1972)] we noted that when substantial underrepresentation is shown as compared with general population figures, the burden of proving lack of qualifications is on the Company.

Id. at 544 (citation omitted). And, there is good reason for this. Requiring too much proof initially from a plaintiff may defeat a valid claim of discrimination before its validity is discerned. Allowing proof of the prima facie case with glaring statistics, however, does not unduly burden a defendant. The defendant, in rebuttal, can prove the unaccounted-for qualifications, thereby undermining plaintiff's case. *Cf. Vuyanich v. Republic National Bank of Dallas*, 505 F.Supp. 224, 356 n. 169 (N.D. Tex. 1980). In this case plaintiffs not only introduced "compelling" statistical evidence, they introduced substantial "other evidence" under *Arlington Heights* as well. We must accept plaintiffs' prima facie case as established; it behooved the government to rebut the case, if it were able, by introducing evidence of those unaccounted-for parole qualifications.

Third, it is nonsensical to require plaintiffs to establish qualifications of the plaintiff class when the relevant qualifications were vague, uncertain or unknown. The district court could not state the detention/parole policy with any certainty. The district court found that no guidelines for parole were ever promulgated. The district court stated that because of the lack of guidelines government witnesses described one policy while their subordinates enforced another. *See Louis III* at 981 n.24.

Yet, despite its inability to locate a written parole policy, and its inability to specify exactly what the policy was, either of which would indicate those qualifications important to a parole determination, the court below swept away plaintiffs' statistics on the basis that they did not reflect the relevant qualifications. The district court stated:

> Factors that may be considered include the age and health of the alien as well as the reason he does not appear entitled to enter this country. Other factors include being accompanied by a minor and pendency of an I-130 application. These factors, with the exception of documentation, were not separately analyzed by Plaintiffs' expert. With regard to his analysis of the significance of possessing documents it was far too simplistic because it did not distinguish between the types of documents possessed and the facial validity thereof.

Louis III at 982. This determination is clearly erroneous and wholly unsupported by the evidence. *Pullman Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). It also conflicts with the district court's own determinations concerning the APA claims, determinations which for the most part we uphold. Although factors similar to those mentioned by the district court were suggested piecemeal during the course of the trial, there is no evidence to suggest they formed a coherent policy.[42] Rejecting a well-supported claim of discrimination on the basis of vaguely-asserted and ill-defined qualifications represents a clear error of law and fact.

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[42] In December of 1981 INS did publish "Detention Policy Guidelines in Exclusion Cases." *See* Px. 71c. This post hoc rationalization of the government's policy is insufficient to prove a policy implemented in fact in the early spring of 1981. We also note the district court's enunciation of relevant factors differs significantly from these guidelines, which contain no mention of, for example, "the reason . . . [the alien] does not appear entitled to enter . . . ."

Fourth, even had those factors relied upon by the district judge uniformly and consistently been offered by government witnesses they would be insufficient proof of additional parole qualifications. The law is clear that "mere protestation" is insufficient to rebut a plaintiff's prima facie case. *E.g., Castaneda v. Partida*, 430 U.S. at 499 n.19, 97 S.Ct. at 1282 n.19, 51 L.Ed.2d at 513, n.19; *Alexander v. Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536, 543 (1972). Yet, the record contains nothing more than the self-serving testimony of high government officials that the policy was not intended to be discriminatory, *see, e.g.*, Nelson testimony, 47 Tr. 1972-73; Guiliani testimony, 49 Tr. 2343, as well as a variety of vague, contradictory statements concerning parole factors. *See supra*, at 1470-1473 (disagreement among government officials as to policy).[43] Beyond this,

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[43] The government cites *United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982), for the proposition that testimony alone is sufficient to rebut statistical evidence of discrimination. In *Perez-Hernandez* the criminal defendant challenging selection of the grand jury foreman established through statistical evidence a prima facie case of discrimination. In rebuttal eight district judges testified as to the criteria used in choosing a foreman. "Each judge testified that he acted independently of the other judges in choosing a grand jury foreman, although each employed similar guidelines in making a selection." *Id.* at 1387. The record indicated no evidence the judges ignored the stated criteria or chose non-minorities over equally qualified minority jury members. *Id.* at 1388.

Perez-Hernandez is distinguishable from this case. First, there is no basis for the "qualifications" evidence found in the testimony of the government witnesses in this case. The district judge himself stated no one witness offered the same criteria. Further, those criteria never were communicated to the INS officers actually granting or denying parole. By contrast, in *Perez-Hernandez* those actually charged with discrimination testified. Second, there was no evidence in *Perez-Hernandez* that refuted the rebuttal testimony. The record before us is replete with testimony contradicting the good-faith affirmations and self-serving criteria of government witnesses. Testimony alone is insufficient when there is little reason to credit it, and when the record gives rise to serious question as

the record is clear that whatever the officials responsible for policy formulation intended, those intentions never were conveyed to immigration officials responsible for implementation of the policy.

Fifth, the government failed to demonstrate that parole decisions were made in a non-discriminatory manner. Although the evidence at trial was clear that parole decisions were made, if at all, at a rather low level of authority in the immigration corps,[44] the government declined to offer as a witness any individual who could explain or demonstrate exactly which factors were considered in granting parole. *See Castaneda v. Partida*, 430 U.S. at 497-99, 97 S.Ct. at 1281-82, 51 L.Ed.2d at 512-13 (discussing value of jury commissioner testimony to rebut statistical evidence of discrimination). In this regard the opinion of the Second Circuit in *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982) is instructive. In *Sava* the Court of Appeals admonished the district judge for substituting his judgment for the discretion of the District Director, *who took the stand to explain in specific cases why members of the plaintiff class were not paroled.*[45] The record before us is devoid of any such evidence.

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to the validity of that testimony. In that situation, the testimony must be supported by proof. In this case the government produced no evidence that the policy criteria were communicated to INS officers, nor did it provide testimony as to the basis of a parole decision in any given case.

[44] The alternative formulation suggested by the district court was that the new policy as announced withdrew from the district directors all discretion to parole undocumented Haitians. The district court cautioned that any regulations promulgated in response to its final order that had this effect would be violative of due process, *Louis III* at 1001-02 n. 52. As we have no due process claim before us we venture no opinion as to the district court's analysis.

[45] We are mindful of the language in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), to the effect

Sixth, shifting the burden to the government to establish special qualifications especially is appropriate when the data necessary to evaluate alleged qualifications is uniquely in the government's possession and when, as here, plaintiffs have requested and not received the necessary data. Almost all the data analyzed by plaintiffs' expert came from the government in response to discovery requests. We have scrutinized that data; for the most part it is lacking entirely in information sufficient to permit qualification analysis. As a general rule we will not penalize one party for failing to explain or present data uniquely in the possession of the other. *See Reed v. Rhodes*, 607 F.2d 714, 735 (6th Cir. 1979) (party may not complain of district judge's misuse of data they provided, particularly when opportunity existed to explain correct figures), *cert. denied*, 445 U.S. 935, 100 S.Ct. 1329, 63 L.Ed.2d 770 (1980).[46] It was error to hold plaintiffs responsible for any failings of the data.

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that proof of non-discriminatory individual actions need not bind a court where the concern is proving a pattern of discrimination. *Id.* at 343 n. 24, 97 S.Ct. at 1858 n. 24, 52 L.Ed.2d at 420 n. 24. Here, however, the government challenges plaintiffs' failure to present a statistical case that takes special qualifications into account. In this instance proof of what those qualifications were, and that they were applied, would have been beneficial, *see Castaneda*, 430 U.S. at 499, 97 S.Ct. at 1282, 51 L.Ed.2d at 513 (jury commissioner testimony), particularly when the evidence offered showed no qualifications were promulgated or communciated to immigration officials allegedly applying those qualifications.

[46] The district court stated "[t]he decision to grant a deferred inspection takes into account many factors not contained in the data analyzed by Plaintiffs' statistician." *Louis III* at 983. Having so stated the facts, however, the district court failed to give them appropriate credence. Not only was information necessary to do qualification analysis not in the data Dr. Gitlow analyzed, but all of the necessary data was in the government's possession. It certainly is not the fault of plaintiffs that the data they analyzed was insufficient; plaintiffs vigorously fought to obtain all relevant data the government possessed. Despite untold discovery requests and motions, the government produced only that data analyzed. In fact,

Seventh, despite the fact that the alleged qualifications never were cogently described by the government, and that the government never produced data susceptible to qualification analysis plaintiffs anticipated and adequately met the government's statistical challenge. Plaintiffs offered a variety of statistical and testimonial evidence to demonstrate that qualifications were irrelevant. Dr. Gitlow analyzed the data from a similar case in New York, *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982). The statistical data from *Sava* certainly suggested that documentation, asylum and family ties had little or nothing to do with the release of some 107 non-Haitians arriving after May 20, 1981.[47] 45 Tr. 1631 et seq. Next, Dr. Gitlow performed multivariate analysis on the District

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a fair portion of the data was produced while trial was in progress, on occasion the day the data was to be discussed in court. Further, the very fact that immigration records are not readily susceptible to qualification analysis casts doubt on the relevance of the suggested qualifications.

It would be inaccurate to represent that the government's records were entirely lacking in information concerning family ties, asylum claims, etc. The truth is that the quality of the data evaluated differed drastically, presumably because of files lost, or differences in those completing the files. It is equally apparent, however, that when that data was available it did not support the government's position. A quick review of the data indicates the lack of correlation between the asserted qualifications and parole. We stress, however, that we are not deciding the case on an independent view of the data. Because the data is so uneven in quality we are excusing plaintiffs from any burden to have attempted qualifications analysis.

[47] The government challenges the use of the *Sava* data, but its grounds are inapposite. The district judge in *Sava* was reversed for substituting his judgment for that of the district director. What distinguishes *Sava* is there the district director testified, proved his involvement in parole decisions, enunciated what factors he considered, and in what manner. The Second Circuit held that the district court's second-guessing of the district director on this issue was inappropriate. Here, we have no testimony from any party admitting involvement in the parole decisions. The district director in Miami specifically testified that he had delegated his parole authority, 48 Tr. 2156, Howerton Dep. at 12, and could not

VI data and there again demonstrated document status had little to do with detention or parole.[48] Finally, Robert Boyer, an immigration attorney involved with Nicaraguan applicants for asylum and admission, identified numerous occasions where Nicaraguans arrived with fraudulent documents, or no documents, no claimed family ties, no illness or other disability, yet were released while their asylum claims were pending. 39 Tr. 426, *passim*. As Boyer's testimony was unrebutted, it is evident plaintiffs proceeded much further with a qualification argument than the government would have us believe.[49]

It strikes us plaintiffs managed to disprove a case the government has failed to make in any way other than by mere protestation or arguments of counsel. The government certainly failed to establish the invalidity of plaintiffs' methodology. For the seven reasons enumerated above we approve the proof of impact established by plaintiffs.

2. *Minimizing Impact—Rebuttal*

The government advanced three arguments to explain the disparate impact of its new policy upon the Haitians.

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say specifically what the parole criteria were. 48 Tr. 2159. The delegees did not testify.

[48] The district court believed Dr. Gitlow's document analysis was "far too simplistic" in that it did not distinguish between type of document and whether it was a case of fraudulent documents or non-existent documents. Yet, the data coding sheets agreed upon by the parties call for a (U) for undocumented, or a (D) for documented. Some entries read D-PP (presumably documented, passport), and then contain in comments "no visa." Further, the role of documents was one more factor about which high-ranking government officials disagreed. *See supra* n. 9.

[49] On cross-examination the government vigorously questioned Boyer concerning the underlying validity of Nicaraguan claims for admission. This was irrelevant. The individuals about whom Boyer testified were all paroled or granted deferred inspection despite document problems and before the underlying merits of their claims were investigated. This suit is not addressed to whether individuals eventually succeeded with an asylum claim or were deported, but with interim events.

Finding merit in these arguments, without according special weight to any of them, the district court found that the apparent disparate impact on the Haitians could be explained "on grounds other than race and/or national origin." *Louis III* at 1000. This was error. Not only are the arguments largely irrelevant, but crediting them rewards the government for its misconduct.

The culprit first identified by the government to exonerate it from responsibility for the disparate impact of the new policy is the district court for the Southern District of Florida. In *Louis I* that court entered an injunction prohibiting the government from holding exclusion hearings for, or from deporting, unrepresented class members. Presumably, because it was enjoined from conducting exclusion hearings for class members, the government was required to hold the Haitians in detention. According to the government, the injunction, and not discriminatory intent, was responsible for the incarceration of a disproportionate number of Haitian immigrants.

As stated *supra*, the injunction was entered in federal district court because the district judge determined plaintiffs had a likelihood of showing on the merits that defendant INS' proceedings in exclusion were "violative of the law." *Louis I*, 530 F.Supp. 924, 929 (S.D. Fla. 1981). In addition to numerous instances of misconduct cited by the district judge, the court's findings as to irreparable harm are worthy of quotation:

> Indeed, in an earlier point in these proceedings, INS deported eleven refugees to Haiti pursuant to procedures that the government later agreed were faulty. Unfortunately, the government's concession came too late to assist these eleven individuals. It is to prevent a similar problem that this Court must enjoin the deportation of unrepresented class members.

Id. at 928.

We perceive two enormous difficulties, one factual and one equitable, with the government's claim that the injunction, and not the government, was responsible for the number of Haitians in detention. Factually, there was no reason for the government to continue detaining class members simply because it could not proceed to exclude them. There was always the option of parole, the discriminatory award of which forms the gravamen of this action. The government may not have wished to parole the Haitians, preferring detention as a matter of policy,[50] but it certainly was not enjoined from exercising its parole powers. The injunction in *Louis I* does not explain adequately the disparate impact.

Second, as an equitable matter we are disturbed the government should ask us to excuse a prima facie showing of misconduct on the basis of an injunction entered in response to other governmental error or misconduct. The injunction was entered in *Louis I* in the face of rather egregious government misconduct. Acceptance below of the injunction in *Louis I* to explain the discriminatory detention of Haitians has the appearance, if not the effect, of condoning the government's earlier misconduct. That is particularly true as the injunction entered in *Louis I* did not require detention, nor did it foreclose parole. Accordingly, it was error for the district court to accept this explanation in rebuttal.

The second culprit allegedly responsible for the appearance of disparate impact is the Immigration and Naturalization Service, which instituted a program of bringing the Haitians before an immigration judge before allowing them to depart voluntarily. The district court found that although individuals from other nations were permitted to withdraw their applications for admission and depart immediately this "voluntary departure" was a slower process for Haitians because of the INS rule. Ostensibly

[50] The government's preference was apparent from the trial testimony. When asked at what point the government planned releasing the Haitians, Commissioner Nelson responded that would be as soon as the injunction was lifted and they could be excluded, then deported. 47 Tr. 1983.

this extra precaution took so much time that it partly explains the enormous disparity between Haitians and non-Haitians detained.

Voluntary withdrawal is a process whereby an alien in exclusion proceedings may decide to terminate those proceedings, "voluntarily withdraw" from our borders, and return from whence he came. Voluntary withdrawal of the Haitians became an issue when the HRC challenged voluntary withdrawals as alleging coercion and misrepresentation on the part of INS officials. The Special Master appointed to investigate these allegations found that although a certain number of Haitians withdrawing were doing so voluntarily, this was not universally the case. Master's Report and Recommendations at 12, 15, 16, 18. The Special Master found some Haitians were withdrawing due to the conditions of their detention, some because of despair at continued incarceration and separation from families, and some because of a lack of knowledge of their rights. *Id.* at 12, 15, 17-18.[51]

Voluntary withdrawal, and the INS program inserting an immigration judge into the process, is unrelated to the disparate impact of the new policy. At most this additional process delays departure of withdrawing Haitians a day or so. It might even prevent the departure of those

[51] The Special Master described the Haitians he interviewed in these general terms:

> Often confused, bored and imprisoned, denied freedom of choice, freedom to roam without being counted, these Haitian refugees' hearts and spirits were broken.
>
> Without exception, the Haitians interviewed could not fathom what they had done to cause their incarceration. Those factors, and others which surfaced during the interviews, made it clear to the Master that there were elements of emotional trauma, fear, "pressure against the power of resistance," and subtle, indirect, as well as (in a few cases) direct, efforts to overpower the weak-willed, disheartened and disillusioned. See and compare, *Stein v. New York*, 346 U.S. 156, 185, 73 S.Ct. 1077, 1093, 97 L.Ed. 1522 (1953).

Master's Report and Recommendations at 9.

whose "voluntary" withdrawal was in fact coerced. In no way, however, does the special procedure prevent INS from paroling Haitians into the community.[52]

Finally, there is the "asylum" argument. The district court explained:

> Another reason [for the apparent disparate impact] is the State Department's position, be it right or wrong, that a prima facie case of asylum is not established solely by virture of the fact that a Haitian national has left his homeland. Without the opportunity to present further evidence that there is a well-founded fear of persecution upon return to Haiti, the individual Plaintiffs herein cannot establish a prima facie case for asylum thereby entitling them to release on parole.

Louis III at 1000.

This explanation also fails. First, no government witness established that citizenship in any relevant compari-

[52] In this context the district court stated:

> . . . there is some evidence in the record that aliens of other nationalities, particularly Mexicans, when faced with the choice of staying in detention or voluntarily departing the country, choose the latter alternative.
>
> On the other hand, Haitians cannot voluntarily withdraw their applications for admission without court approval and, therefore, release of Haitians who desire to voluntarily depart is significantly delayed.

It is not clear from the district judge's opinion what required "court approval." We assume he referred to the immigration judge procedure, and address this claim in the body of the opinion. It is also possible he was referring to the injunction entered in *Louis I*, which prohibited the deportation of *any* class member, whether for voluntary departure or otherwise. This alternative interpretation likewise is invalid. First, it suffers the same defects as the argument concerning the injunction from holding exclusion hearings. Second, the injunction in *Louis I* specifically was modified to allow the voluntary departure of some Haitians. *Louis v. Meissner*, No. 81-1260-CIV-ALH Order of Nov. 26, 1981) (Kehoe, J.).

son group constitutes a prima facie case for asylum. Second, evidence differed on the effect of a prima facie case for asylum on detention and parole. *See* n.9 *supra*. Finally, as we explore *infra*, the government took discriminatory steps to cut off the Haitians from one avenue by which they could claim asylum. If asylum is so important to release that a prima facie case for asylum makes the difference between freedom and incarceration the government should have made asylum procedures readily available to the Haitians.[53]

D. *The Final Analysis*

We are left, then, with a strong case of discrimination essentially unrebutted by the government. Plaintiffs introduced statistical information based on data provided by the government, data which showed that class members suffered a grossly disparate impact of the new policy. Plaintiffs also introduced a mass of testimony and documents relevant to various other *Arlington Heights* factors. In response the government relied on five witnesses.[54] One testified only to the access issue in remote detention facilities, *see infra*; another only to efforts of the Bureau of Prisons to locate detention space. The three remaining witnesses were Guiliani, Nelson and Howerton, whose testimony we discussed *supra*. All were admittedly removed from the actual process of parole, their testimony was inconsistent, and their self-serving affirmations of good faith fail to constitute rebuttal.

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[53] We are aware that a "prima facie" case for asylum differs from a grant of asylum based on the evidence. But, a grant of asylum *a fortiori* is stronger grounds for release than a "prima facie" case, which might be rebutted in the final analysis. The inequity of the government's program that eliminated Haitian claims to the district director, therefore, compels us to reject the government's argument that being Haitian does not qualify one for "prima facie" asylum.

[54] In addition to these 5 "main" witnesses, other individuals testified to the numerical computations underlying the government's "statistics."

The facts bear review. The government introduced no evidence of what was actually occurring. No individual responsible for parole and detention decisions took the stand. The District Director testified he had delegated his authority to others, others who in turn testified in depositions to still further delegations. The evidence does not support any but the vaguest view of the new policy. Even if trial witnesses had established a uniform new policy, that new policy was never communicated to INS officials responsible for its implementation.

The government's case therefore consisted of nothing but "mere protestation" and "arguments of counsel." These do not constitute rebuttal of a prima facie case of discrimination, especially one as strong as that proven by plaintiffs. *See Burdine*, *supra*, 450 U.S. at 255, n.8, 101 S.Ct. at 1094, n.8, 67 L.Ed.2d at 216 n.8; *Castaneda*, *supra*, 430 U.S. at 499, n.19, 97 S.Ct. at 1282, n.19, 51 L.Ed.2d at 513 n.19; *Alexander v. Louisiana*, 405 U.S. 625, 632-33, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536, 543 (1972). In fact, the government's case as presented reminds us of equally applicable language from *Castaneda*:

> We emphasize, however, that we are not saying that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case.

430 U.S. at 499, 97 S.Ct. at 1282, 51 L.Ed.2d at 513.

As the district court recognized, this is a classic case of unguided and unfettered discretion. *Louis III* at 981 n.24. Cases are legion that discern the dangers of unguided discretion, preeminent among them the risk of selective and discriminatory enforcement. *E.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170-71, 92 S.Ct. 839, 847-48, 31 L.Ed.2d 110, 120 (1972); *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70, 373-74, 6 S.Ct. 1064, 1072-73, 30 L.Ed. 220 (1885); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971). "Where, as here, there are no standards govern-

ing the exercise of discretion . . ., the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou*, 405 U.S. at 170-71, 92 S.Ct. at 847-48, 31 L.Ed.2d at 120. The obvious solution, frequently recommended to avoid the dangers of discriminatory enforcement, would have been a specific policy pursuant to notice and comment rulemaking. *See Environmental Defense Fund, Inc. v. Ruckelshaus, supra*, 439 F.2d at 598 (courts should insist on rules and regulations that articulate the standards by which discretion is exercised) (cases cited). *See also Davis*, §§ 7.26, 9.7 (same).

The district court concluded its opinion noting "[t]he appearance and allegations of discrimination in the case at bar could have been avoided by promulgation of the new detention rule pursuant to the APA." *Louis III* at 1001-02. We agree, though we find the discrimination real. The rulemaking requirements of the APA provide a minimum, not a maximum, to administrative procedure; they serve a crucial purpose in guiding administrative discretion. That is, and should be, the lesson of this case.

IV. Dismissed Claims: Asylum and Counsel

Prior to trial, on the basis of standing, exhaustion, and 8 U.S.C. § 1105a, the district court dismissed seven claims. Plaintiffs appeal the dismissal of two: whether individuals appearing for a preliminary inspection at the border are entitled to have counsel present and notice of that right and whether the INS must provide aliens with notice of the right to file for political asylum. *Louis II*, 532 F.Supp. 881, 885-92 (S.D. Fla. 1982). Plaintiffs argue 8 U.S.C. § 1105a does not bar the claims, adequate injury was alleged to give them standing, and exhaustion was not necessary in the given case.

A. *8 U.S.C. § 1105a*

Construing the Immigration Act of 1917 in *Heikkila v. Barber*, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972 (1953),

the Supreme Court held habeas corpus was the only means by which to challenge a final order of deportation. In a series of cases in the mid-1950's, however, the Court indicated the Immigration Act of 1952 mandates a different result. *Brownell v. Tom We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955). These cases held that in addition to habeas corpus, an action for declaratory or injunctive relief would lie to test the legality of deportation and exclusion orders.

Largely in response to *Brownell v. Tom We Shung, supra*, Congress amended the 1952 Act to include § 1105a, which reads in pertinent part:

> (b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act *may obtain judicial review of such order by habeas corpus proceedings and not otherwise.*
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order . . . .

(emphasis supplied). Congress enacted § 1105a to cure what it perceived to be widespread abuse of judicial process by aliens against whom final orders of deportation or exclusion had been entered. *See, e.g., Brownell* (petitioner We Shung manages to delay deportation seven years while litigating issue of review). Section 1105a(b) makes clear that an alien in custody subject to exclusion has only one means of available review, an action for habeas corpus in the district court following exhaustion of all administrative remedies. Relying on § 1105a the district court dismissed the two claims raised on appeal.

The government virtually concedes that the express language of § 1105a does not govern the claims advanced by the Haitians. "To be sure, 8 U.S.C. § 1105a by its terms deals with judicial review of . . . 'a final order of exclusion,' whereas the plaintiffs have not yet undergone exclusion . . . hearings." Appellees supp. cross-brief at 20. The government argues, however, that the intent of Congress in enacting § 1105a was to limit judicial review of exclusion proceedings to one proceeding—habeas corpus—rather than permit collateral attack before commencement of, or following, the immigration proceeding.[55]

Although the government's statement of Congressional intent is accurate, it is incomplete. Though Congress was concerned with unjustifiable delay, it was concerned with fair hearings as well. A close examination of the legislative material shows a balance of these competing interests.

Committee reports, and letters from administration officials included therein, evidenced displeasure with suits brought "solely for the purpose of preventing or delaying indefinitely [] deportation from this country," H.R. Rep. No. 1086, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Ad. News 2950, 2967, and complained of the "alien who has once had his day in court, with full rights of appeal to the higher courts, . . . [and who is] permitted to block his removal and cause unnecessary expense to the government by further judicial appeals, the only purpose of which is delay," *id.* at 2968. Congress was interested in ensuring, however, that the alien receive a fair determination of his right to reenter or

[55] Because we presume judicial review of agency action unless review explicity is precluded by statute, *Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192, 199 (1970); *Celanese Chemical Company, Inc. v. United States*, 632 F.2d 568, 575 n. 15 (5th Cir. 1980), we question the propriety of restricting judicial review in this case, where the government concedes the statute does not govern. We need not decide this question, however, in light of our decision that the intent of Congress was not to restrict review in this case.

remain. *Id.* at 2967 (habeas will permit determination of whether hearing was fair, and exclusion on basis of grounds specified by Congress). It is an accurate statement of the legislative intent, we believe, that section 1105a provide "a fair, just, uniform and expeditious system of judicial review," *id.* at 2969 (letter of March 30, 1959 from Lawrence E. Walsh, Deputy Attorney General, to Hon. Emanuel Celler, Chairman, Committee on the Judiciary, House of Representatives) (approving amendment to 1952 Act on behalf of administration). Our examination of plaintiffs' claims in light of the need for a fair, just, uniform and expeditious review convinces us that by passing 1105a Congress did not intend to close the courthouse doors to the issues dismissed by the court below.

Two factors in particular lead us to this conclusion. First, we do not here review the claims of one individual seeking relief from an order of exclusion. Rather, we are presented with the claims of over one thousand incarcerated aliens challenging similar procedural irregularities occurring prior to the commencement of exclusion hearings. Requiring each of these individuals to proceed to a final order only then to challenge the procedures on habeas would be neither uniform nor expeditious. Ignoring these issues would be to frustrate, not further, the intent of Congress. Given the opportunity to resolve at this juncture issues of widespread applicability, it would be error to decline jurisdiction on the basis of § 1105a.

We reasoned similarly in *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), where the issue was whether the district court correctly retained jurisdiction over claims of the Haitian Refugee Center alleging procedural violations in the government's handling of asylum claims of deportable Haitians. Upholding jurisdiction in the district court we stated:

> Although a court of appeals may have sole jurisdiction to review alleged procedural irregularities in an

> individual deportation hearing *to the extent these irregularities may provide a basis for reversing an individual deportation order*, that is not to say that a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is not a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief. The distinction we draw is one between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged.

HRC v. Smith, 676 F.2d at 1033 (emphasis in original). The distinction enunciated in *Smith*, between an individual challenge to a deportation ruling and a wholesale program of constitutional violations, applies equally to exclusion proceedings.[56]

There is yet a significant second factor. In this case we have no confidence that the alleged violations ever will be remedied in subsequent administrative or habeas proceedings. In *Louis I* this concern also was expressed:

> In addition, the testimony has amply established that many of the refugees in the remote areas are unrepresented and are unlikely to be represented, either at their exclusion proceedings, at any possible appeal to the Board of Immigration Appeals,

[56] Although the procedure due any individual alien in exclusion is not of constitutional magnitude, the character of the action changes when it challenges a widespread program calculated to deprive an entire class of statutory rights. Though the alien's due process right may only be to that process Congress determined was due, the class-wide deprivation of that process by the Executive is an equal protection violation.

> or to obtain judicial review of the issuance of a final order of exclusion by habeas corpus. Without such representation, a refugee receiving a final order, will thus be subject to immediate exclusion and deportation from this country.

530 F.Supp. at 928. Nor was such concern without firm foundation: eleven Haitians had already been deported pursuant to "faulty" procedures. *Id.* Not only was lack of representation a problem, but evidence taken at the preliminary injunction hearings indicated that Creole translators often erred in translations, *id.* at 927, failed to give proper notice of the right to apply for asylum, *id.*, or to appeal the decision of the immigration judge. *Louis I*, 530 F.Supp. at 927. If an alien does not understand the right to appeal, and declines to do so, habeas review never will occur.

We are persuaded by the legislative history of § 1105a that Congress, as eager as it was to eliminate delay and multiplicitous proceedings, genuinely intended that aliens receive a full and fair hearing. Although in exclusion the alien is entitled only to that process Congress provides as due, *Mezei*; *Knauff*, here Congress intended the ancient writ to be available, and used, to resolve procedural issues. Uncertain that the will of Congress can govern in the face of procedural confusion we provide the most sensible alternative available—review of allegations of wide-spread procedural violations before those violations cause irreparable harm.[57]

[57] § 1105a is inapplicable altogether if the asserted claim is unrelated to exclusion hearings. *See Foti v. INS*, 375 U.S. 217, 229, 84 S.Ct. 306, 314, 11 L.Ed.2d 281, 290-92 (1963) (1105a encompasses all claims within final review of administrative process); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 215-17, 88 S.Ct. 1970, 1975-77, 20 L.Ed.2d 1037, 1044-45 (1968) (same). In *HRC v. Smith* we interpreted Supreme Court precedent to mean that § 1105a(a) [exclusive review in Court of Appeals] applied to "any attack *upon the proceedings* in which a deportation order was entered or upon any matter 'intimately and immediately associated' with

Agreeing to review similar claims in deportation hearings we cautioned in *HRC v. Smith* that:

> [w]e wish to emphasize the factual uniqueness of this case. . . . Congress resolved this problem by consolidating jurisdiction over challenges to final orders of deportation in one court, the court of appeals. We do not intend by our holding today to emasculate that solution, and given the narrowness of our holding, we do not expect such a result.

Id. at 1033. Our decision should not be viewed as a departure from the admonition in *HRC v. Smith*. Rather, it is yet another decision under facts paralleling, and related to, those in *HRC v. Smith*.

B. *Standing and Exhaustion*

In addition to § 1105a the district court relied on principles of standing and exhaustion to dismiss Counts II and VII. Standing is a mandatory jurisdictional consideration: Article III requires a plaintiff prove injury before federal courts may hear his cause. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Exhaustion on the other hand is discretionary in the district court: although as a general matter judicial economy and deference to administrative tribunals require a plaintiff to pursue all administrative remedies prior to requesting relief in

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the final order or '*governed by the regulations applicable to the deportation proceeding itself*, and . . . ordinarily presented to the special inquiry officer who entered the deportation order' . . . ." *Id.* at 1032 (citation omitted). We believe similar analysis would apply to review of exclusion hearings as governed by § 1105a(b). Under this analysis plaintiffs' claim concerning notice of the asylum right may be eligible for separate review to the extent that a claim could be brought more favorably first before the district director, as some testimony indicates. Because we rely instead on a broader rationale, however, we need not determine those issues, if any, cognizable in an independent action brought by an individual.

court, circumstances may mitigate against exhaustion in a given case. *National Labor Relations Board v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 419, 426 n. 8, 88 S.Ct. 1717, 1723, n. 8, 20 L.Ed.2d 706 (1968); *HRC v. Smith*, *supra* at 1034; *Patsy v. Florida International University*, 634 F.2d 900, 904 (5th Cir. 1981), *rev'd on other grounds*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

Exhaustion requires that plaintiffs pursue all available administrative remedies prior to asking a court for relief. *McKart v. United States*, *supra*, 395 U.S. 185, 193-95, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969). Exhaustion advances a number of valuable goals, including:

> (1) allowing the agency to develop a more complete factual record; (2) permitting the exercise of agency discretion and expertise on issues requiring this; (3) preventing deliberate disregard and circumvention of established agency procedures; and (4) enhancing judicial efficiency and eliminating the need for judicial vindication of legal rights by giving the agency the first opportunity to correct any error.

HRC v. Smith, *supra* at 1034 (citations omitted). When, however, these policies are not served by requiring exhaustion, the district court may, in an exercise of its sound discretion, excuse the exhaustion requirement. *Industrial Union of Marine & Shipbuilding Workers*, *supra*, 391 U.S. 418, 419, 426 n. 8, 88 S.Ct. 1717, 1723 n. 8, 20 L.Ed.2d 706 (1968).

The district court found plaintiffs failed to exhaust administrative remedies for the counsel and asylum claims, asserting the ills of the alleged violations could be cured at any point prior to entry of a final order of exclusion. *Louis II*, 532 F.Supp. at 888 & nn. 8-9. Addressing the counsel claim the court stated: "[*i*]*f* an alien has a *right* to be represented by counsel during an

interview with an INS representative, and *if* a statement is taken from him in derogation of that right, which is used in subsequent proceedings and results in the entry of a final order of exclusion, that practice or procedure is reviewable on appeal to the BIA and in habeas proceedings." *Id.* Because class members most probably will be represented by counsel in subsequent exclusion hearings, *see, e.g.*, Stipulation Regarding Intervention of the Dade County Bar Association Haitian Refugee Volunteer Lawyer Task Force, and because the violation does "merge" into the final order of exclusion, we do not believe the district court abused its discretion in dismissing the counsel claim as unexhausted. Accordingly, we need not reach the question of standing on the counsel claim.

Standing and exhaustion as they apply to the asylum claim present a very different question. We disagree that the harm alleged in the asylum claim may be cured in subsequent proceedings. An alien uninformed of the right to request asylum is denied any opportunity to present an asylum claim before the district director. Testimony in the record indicates that requesting asylum before the district director is more favorable than asserting an asylum claim before an immigration judge in exclusion proceedings. Whether or not the chance of success is greater in the former proceeding, it is non-adversarial, which is not the case before the immigration judge, where an asylum claim is opposed by the INS. *See* 41 Tr. 824 (Anker testimony). Proceeding before the district director is undeniably one extra avenue to pursue in an attempt to remain in this country.

Consequently, the right to request asylum from the district director does not merge into a final order of exclusion. The proceeding before the district director is ancillary to, not a part of, the administrative proceedings reviewable before the BIA and on habeas. In *HRC v. Smith* we rejected a similar argument. *Id.* at 1035-36. There plaintiffs challenged the procedures used by the district director in addressing asylum claims, and we

held exhaustion before the immigration judge unnecessary because administrative proceedings were an entirely different matter: the immigration judge simply has no authority over the district director. *A fortiori*, failing to notify plaintiffs here of their right to claim asylum deprived them altogether of an opportunity to appear before the district director. As we explained in *HRC v. Smith*:

> It is tautological that the exhaustion doctrine does not preclude the exercise of jurisdiction when there are no further administrative remedies to pursue.

Id. at 1035. *See also Porter v. Schweiker*, 692 F.2d 740 (11th Cir. 1982).

Our determination on grounds of exhaustion applies also to the question of standing. The district court held plaintiffs lacked injury-in-fact because the injury only was "threatened," and could be cured in the exclusion proceeding. *Louis II*, *supra*, at 890-91. In part this is based on the district court's adherence to the notion that the process to which plaintiffs are entitled, *Mezei*, *Knauff*, is nothing more than an exclusion hearing. This is error. The Administration's own witnesses characterized the proceeding for asylum before the district director as a statutory and regulatory right. Statement of Alan C. Nelson before the House Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law (Oct. 28, 1981) at 5 (law permits two avenues of asylum; district director and immigration judge); *Meissner testimony* at 3-4 (same). As we noted, *supra*, denial of this course of action cannot be cured in exclusion proceedings. The immigration judge has no authority over, or to remand to, the district director. *HRC v. Smith*, 676 F.2d at 1035. Accordingly, if they are entitled to notice plaintiffs suffer injury when they are not informed of the availability of district director review. Whether they are so entitled we next address on the merits.

C. *The Merits*[58]

We previously have held that there is "at a minimum, a constitutionally protected right to petition our government for political asylum." *HRC v. Smith*, 676 F.2d at 1038. Because the basis for that right applies equally to excludable and deportable aliens, *id.*,[59] the right to petition for asylum applies to the cross-appellants before us. In *HRC v. Smith* the process by which asylum claims were evaluated was found faulty. *A fortiori*, failure to notify an alien of the right to claim asylum, thereby closing the door entirely on the process, must violate the right to present a petition for asylum.

The record shows that Haitians arrive in this country unschooled in our language and largely in ignorance of our legal system. *Cf. Louis I, supra*, at 926 (need for Creole translators). The record also indicates that "even in Miami, where INS Creole translators are presumably

[58] The government, apparently convinced we would uphold the court below on the issue of jurisdiction, deemed it unnecessary to brief the merits of plaintiffs' claim. Although an adversary presentation serves to enhance our decisionmaking process, established precedent in this area convinces us that plaintiffs' claim has merit.

The government also urges we abstain from deciding this issue because it was not decided by the court below. *See Equal Employment Opportunity Commission v. Standard Forge and Axle Company, Inc.*, 496 F.2d 1392 (5th Cir.), *cert. denied*, 419 U.S. 1106, 95 S.Ct. 776, 42 L.Ed.2d 801 (1974). *Standard Forge* is premised upon cases such as *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941); those cases make clear the reason for abstention is to allow the lower court or administrative body to hear evidence. *Id.* at 556-57, 61 S.Ct. at 721, 85 L.Ed. at 1041. As the government stipulated to presenting this question as a pure question of law, however, letter from Thomas E. Moseley to Ira J. Kurzban (1/8/82), and as we agree, there is no bar to our proceeding on the merits.

[59] The opinion of this court in *HRC v. Smith* relies upon regulations in 8 C.F.R. to support its determination of a constitutionally protected right to apply for asylum. Those same sections apply equally to excludable and deportable aliens. *Compare* 8 C.F.R. 108.1 (1978) *with* 8 C.F.R. 208.1; 208.2 (1982).

proficient, the translations at these [exclusion] proceedings are woefully inadequate." *Id.* at 927. Given this state of affairs we can hardly expect the Haitians arriving at our shores to be aware of, and prepared to exercise, their right to claim asylum.

Congress, however, passed the Refugee Act of 1980, which confers the right to apply for political asylum, to give "statutory meaning to our national commitment to human rights and humanitarian concerns not reflected in the Immigration and Naturalization Act of 1952, as amended." S.Rep. No. 96-256, 96th Cong., 2nd Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Ad. News 141. That commitment is meaningless without notification of the right. *Orantes-Hernandez v. Smith*, 541 F.Supp. 351 at 361 (C.D. Cal. 1982); *cf. HRC v. Smith.* Accordingly, we hold for plaintiffs on the merits of this claim.

V. Access

Evidence at trial identified significant restrictions on Haitian access to legal counsel, restrictions on Haitian contact with relatives and friends in the Miami community, and efforts to prevent HRC attorneys from approaching Haitians to inform them of their legal rights. *See* Px 70; 72a-c (letters requesting access; generally denied); *Louis III* at 983, n.27; Px 15 (Guidelines of Non-Media Visitors). Plaintiffs' complaint challenged these restrictions on numerous grounds, all but the first amendment claim were dismissed prior to trial. Plaintiffs do not challenge the dismissals. After trial the district court found the access claim moot because of the order to release the detained Haitians; the merits of the claim, therefore, were never addressed. Plaintiffs challenge the mootness holding and request a determination on the merits.

The issues raised in this ground of appeal are moot only if no class members are, or could in the future be, in detention or if the challenged INS conduct has ceased. Even under the order of the court below releasing the

Haitians, however, INS retains discretion to revoke parole in appropriate cases. *See Louis v. Nelson*, 544 F.Supp. 1004, Final Judgment, n.6. We proceed, therefore, to the merits.

The government urges us to abstain from deciding the access question on the merits because the issue was not decided by the court below and requires development of a factual record. *See Thomas v. J.C. Penney Co., Inc.*, 531 F.2d 270 (5th Cir. 1976). HRC denies an insufficient record and argues that regardless of the record the INS access guidelines are facially invalid under the strict requirements of the first amendment. Plaintiffs, therefore, would have us award injunctive relief. *See e.g., Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969).

We agree with the government as to the impropriety of immediate relief. Although we find merit in the plaintiffs' association claims, this case does not involve an absolute denial of access, nor does it involve rules we can hold facially impermissible without knowledge of the countervailing circumstances. The government argues, and we agree, that regulation of aliens in detention is analogous to regulation in the prison context.[60] Accordingly, a determination of proper access regulations requires balancing the government's interest in detention and security against the plaintiffs' first amendment rights; preliminarily, a more developed factual record is essential.[61]

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[60] The analogy serves its purpose insofar as concerns for security weigh in the balancing process. We limit our holding to this narrow point; there are obvious differences between temporary detention of innocent aliens and the incarceration of convicted felons.

[61] The Guidelines of Non-Media Visitors, Px 15, appear overly restrictive. We nonetheless remand for a determination of whether these are the rules in force, how they are enforced, and how they compare with other access regulations for detention facilities. We reiterate that on the basis of the record before us we have insufficient information regarding the validity of these access restrictions.

In the interest of judicial economy, however, we find merit in plaintiff's first amendment claims under the rationales of *NAACP v. State ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed. 2d 417 (1978). In *Cruz v. Beto*, 603 F.2d 1178 (5th Cir. 1979), we established that certain rights of mutual access exist between prisoners and counsel.

More particularly we sustain plaintiff HRC's purely legal claim of a right to solicit clients in detention. Although this solicitation may not permit individual face-to-face encounter, if *Button* and *Primus* mean anything they permit legal counsel to inform individuals of their legal rights when counsel does so as an exercise of political speech unaccompanied by expectation of remuneration. Ample evidence supports HRC's role as a politically active representation of the Haitian community. *See Louis III* at 984 n.28. Evidence also shows that absent HRC's assistance many of the refugee class members would never have been informed of important statutory rights accorded them by Congress. Consequently we uphold the efforts of HRC in this regard.

We emphasize, however, that first amendment rights in the prison context, sacrosanct as first amendment rights are, remain subject to reasonable restrictions necessitated by the requirements of security and management of prison community. No cases cited by plaintiffs hold otherwise. Accordingly, we remand this issue for review of the government's access restrictions in light of the principles enunciated herein.

VI. Attorneys' Fees

While this case was before us plaintiffs presented a motion for attorneys' fees. We remand this issue as well, for decision in light of this opinion.

VII. Conclusion

In summation, we reiterate the Executive branch has full authority to protect and control our national borders. In the area of immigration Congress has empowered the Executive to adopt policies necessary to this objective. Therefore, though the change from the old policy to the new policy represented a distinct change in enforcement, from a policy of ready parole with limited exceptions to one of detention with limited exceptions, that policy determination was properly within the realm of Executive decisionmaking. Because those responsible for defining the scope of the policy failed to do so, leaving those who implemented it to apply a "binding norm" of widespread detention of Haitians, recourse to notice and comment rulemaking was required. Accordingly, we affirm the district court as to Count II of plaintiffs' complaint.

We find clearly erroneous, however, based on our careful and searching review of the record, the district court's conclusion that in the enforcement of the new policy there was no discrimination against plaintiff class. On the contrary, there was ample unrebutted evidence that plaintiffs were denied equal protection of the laws, as mandated both by the Constitution and our interpretation of Congress' enabling immigration legislation.[82] Although we held that the Executive, through the INS, has the power when properly delegated to fashion such policies as are necessary to protect our borders and ensure orderly entrance of aliens, those policies must be administered in a non-discriminatory manner. Such a requirement is consistent with the basic principles upon which this country was founded. We therefore reverse the judgment of the district court as to Count VII.

Although we reverse the district court on the equal protection claim, the ultimate result remains the same: plaintiffs impermissibly have been denied parole. We remand to the court below for such relief as is necessary to remedy the discrimination and effectuate the rationale of this decision. Such relief shall include, but is not limited to: (1) an injunction against discriminatory enforcement of the new policy, (2) the continued parole of class members, (3) recordkeeping requirements so the district court may ensure the policy is effectuated in the future in a non-discriminatory manner, (4) such relief as is necessary to resolve the asylum and access issues, and (5) whatever further relief is necessary to ensure that all aliens, regardless of their nationality or origin, are accorded equal treatment.[83]

AFFIRMED in part, REVERSED in part, and REMANDED.

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[82] *See supra* at 1485 (Congress may draw distinctions between classes of aliens; Executive may not do so absent authorization from Congress).

[83] The relief of the district court ordering the release of class members was premised on an APA violation. We require the release to remedy discriminatory enforcement of the new policy. The terms of the relief ordered by the district court are not inconsistent with our holding here today and the court below should feel free to adhere to its original release program, supplementing it as necessary to ensure there is no repetition of the equal protection violation.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 82-5772

MARIE LUCIE JEAN, ET AL., PLAINTIFFS

LUCIEN LOUIS, ET AL., PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

STATE OF FLORIDA, INTERVENOR-APPELLANT

v.

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS-CROSS-APPELLEES

Feb. 28, 1984

Stanley Marcus, U.S. Atty., Sonia O'Donnell, Asst. U.S. Atty., Miami, Fla., Leon B. Kellner, New York City, Robert L. Bombaugh, Rudolph W. Giuliani, Associate Atty. Gen., Barbara L. Herwig, Michael Jay Singer, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., Nade E. Strickland, Crim. Investigator, U.S. INS, Dept. of Justice, Atlanta, Ga., for defendants-appellants-cross-appellees.

Kurzban & Kurzban, Ira J. Kurzban, Miami, Fla., Mary Gilmore, Terrence A. Corrigan, New York City, Michael J. Rosen, Miami, Fla., Christopher Keith Hall, Coral Gables, Fla., for plaintiffs-appellees-cross-appellants.

Vera Weisz, Haitian Refugee Center, Inc., Miami, Fla., Bruce J. Winick, ACLU Foundation of Fla., Inc., Irwin P. Stotzky, Univ. of Miami, School of Law, Coral Gables, Fla., for Haitian Refugee Center.

J. Kendrick Tucker, Deputy Atty. Gen., Tallahassee, Fla., for intervenor State of Fla.

Dan Paul, Paul & Thomson, Steven M. Kamp, Miami, Fla., for amicus American Immigration Lawyers Ass'n.

Arthur C. Helton, Lawyers Committee for Intern. Human Rights, Richard Simpson, Elsie A. Bloustein, Robert L. Weigel, Philip S. Weber, New York City, for amicus Immigration Law Clinic of Columbia University School of Law and Lawyers Committee for Intern. Human Rights.

Appeals from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

[*EN BANC* OPINION OF THE COURT]

VANCE, Circuit Judge:

This case presents complex and fundamental constitutional questions concerning the rights of excludable or unadmitted aliens[1] and the authority of the Executive branch over immigration matters. It arises out of a class

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[1] In this opinion aliens who have reached our border but have not formally been admitted to the United States are described as "excludable" or "unadmitted" aliens. These terms should be understood as synonymous with "non-resident" or "excluded" aliens and "aliens denied entry." Aliens who have succeeded in effecting an "entry in contemplation of law" are described as "deportable" or "resident" aliens. These terms can apply both to aliens who have been permitted to enter by immigration officials and to those who have succeeded in entering this country illegally. We will use the term "exclusion" to refer to the process of excluding and deporting an excludable alien, and "deportation" to describe the process of expelling and deporting a resident alien.

Although "deportation" and "expulsion" technically refer only to the required departure of a resident alien, they are sometimes

action brought on behalf of Haitian aliens who arrived in the Southern District of Florida on or after May 20, 1981 and were detained at various facilities of the Immigration and Naturalization Service (INS) pending a final determination of the merits of their petitions for asylum.[2]

Plaintiffs allege that their incarceration was improper for two reasons. First, they contend that the government improperly failed to comply with the notice and comment provisions of the Administrative Procedure Act (APA) when it adopted a new practice of detaining aliens who could not establish a prima facie claim of admission to this country, rather than paroling them pending a hearing on their petitions for admission to asylum. Second, plaintiffs assert that the new detention policy is illegal because it is discriminatory either on its face or in its

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used informally by the courts to refer to any removal of an alien from this country, regardless of status. When used in this manner, however, it should be understood that these terms "reflect[] none of the technical gloss accompanying [their] use as . . . word[s] of art" in the sections of the immigration laws referring to the removal of resident aliens. *Lung May Mo v. Barber*, 357 U.S. 185, 187, 78 S.Ct. 1072, 1073, 2 L.Ed.2d 1246 (1958). For one commentator's attempt to parse out this terminological confusion, see Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 Yale L.J. 760, 761 n. 8 (1962).

[2] The class certified by the district court comprises:

> All Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and also are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either:
>
> 1) Unrepresented by counsel; or
>
> 2) Represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.

Louis v. Nelson [*Louis III*], 544 F.Supp. 973, 984 (S.D. Fla. 1982).

application, since Haitian aliens appear to be disproportionately affected by the new policy.

The district court concluded that the policy had not been applied in a discriminatory manner, but ruled that the government had failed to comply with the requirements of the APA and ordered the release of the detained class members. *Louis v. Nelson* [*Louis III*], 544 F.Supp. 973 (S.D. Fla. 1982). A panel of this court subsequently affirmed the district court's decision with regard to the requirements of the APA, but found that the district court had erred in holding that plaintiffs had failed to demonstrate that the government's actions were the product of discriminatory intent. *Jean v. Nelson*, 711 F.2d 1455, *reh'g en banc granted*, 714 F.2d 96 (11th Cir. 1983). We now reverse and remand for further findings by the district court. Because the facts of this case have been extensively set forth in the opinions of the panel and the district court, we proceed directly to a discussion of the legal questions involved.

I. COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT

Count Two of plaintiffs' complaint asserted that the new detention policy adopted by the Administration in the summer of 1981 constituted a "rule" within the meaning of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 551(4), and that the government's failure to comply with the rulemaking procedures of the APA rendered the plan void and unenforceable. An administrative agency generally cannot adopt a substantive rule without first publishing notice of the proposed regulation and providing interested parties with an opportunity to comment. *Id.* § 553(b), (c). The government conceded that it had not followed these procedures when it adopted the new detention policy, but argued that it was exempt from these requirements on the grounds that the new approach was not a "rule" within the meaning of the APA. Al-

ternatively, the government argued that even if the new detention program did constitute a rule, it fell within the foreign affairs, interpretative rules, and general statements of agency policy exceptions to the APA's rulemaking requirements. *See id* § 553(a)(1), (b)(A) & (B). The district court rejected these arguments. *Louis III*, 544 F.Supp. at 997. It ordered the government to parole the class members then detained and enjoined the government from enforcing its new detention program until the INS complied with the rulemaking procedures of the APA. *Louis v. Nelson* [*Louis IV*], 544 F.Supp. 1004, 1006 (S.D. Fla. 1982).

After the district court rendered its decision, the government promulgated new regulations in accordance with the APA. *See* 8 C.F.R. § 212.5 (1982). At oral argument before this court counsel for petitioners stated that one hundred or more class members are currently being held in detention, but these detainees either had their parole revoked for failure to comply with the terms of the district court's order, *see Louis IV*, 544 F.Supp. at 1009, or arrived in this country after the government's promulgation of its new regulations. Because the government is no longer detaining any class members except pursuant to the new regulations, the APA issue as originally presented has been rendered moot. The validity of these new regulations is not before this court, and we express no opinion in this regard. We accordingly dismiss the appeal as to Count Two of plaintiffs' complaint and remand with instructions that this part of the district court's judgment be vacated.

II. THE EQUAL PROTECTION CLAIM

The central question raised by this case in its present posture is whether the Haitian plaintiffs may invoke the equal protection guarantee of the fifth amendment's due process clause as a basis for challenging the government's refusal to grant them parole. The district court, reason-

ing that "the [Supreme] Court has never held [that] 'the Constitutional guarantees of the Fifth Amendment do not apply to unadmitted aliens,'" *Louis III*, 544 F.Supp. at 998, decided that it could reach the merits of the Haitians' claim that the government's new restrictive parole policy was being applied in a discriminatory manner. The lower court noted that a string of Supreme Court decisions beginning with *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) have recognized that aliens are "persons" for the purposes of the fifth and fourteenth amendments and concluded that "[p]laintiffs are entitled to the same constitutional protections afforded all persons within the territorial jurisdiction of the United States." *Louis III*, 544 F.Supp. at 998; *see also Jean*, 711 F.2d at 1484. The district court conceded that the Supreme Court has repeatedly stressed that excludable aliens have no constitutional rights with respect to their applications for admission into this country, but it distinguished this case on the grounds that "the[] claim before this Court does not relate to admission and does not challenge Congress' power in that regard. Plaintiffs' claim is that they cannot be denied parole, pending a determination of their admissibility, because of their race and/or national origin." *Louis III*, 544 F.Supp. at 998; *see also Jean*, 711 F.2d at 1484-85.

The lower court also emphasized that while prior Supreme Court decisions have recognized that there are few if any limitations on Congress' power to formulate guidelines and procedures governing the exclusion of unadmitted aliens, even excludable aliens must receive from the Executive whatever degree of due process protection has been authorized by Congress. Thus, the district court held that if Congress intended the statutes under which the INS acted to be applied neutrally to all excludable aliens, the judiciary could review the Haitian plaintiffs' claim that executive officials violated their fifth amendment rights to due process and equal protection by exercising their discretionary parole authority in a discrimi-

natory manner. *Louis III*, 544 F.Supp. at 998-99; *see also Jean*, 711 F.2d at 1485.

The district court therefore stressed that this case involves a challenge to detention, rather than admission. The court below also drew a sharp distinction between the actions of the legislative and the executive branches, asserting that while Congress is free to discriminate in adopting policies that govern the admission or the processing of excludable aliens, the Executive is prohibited from doing so in the absence of an express congressional mandate. We conclude, however, that the lower court's reasoning is flawed with regard to both points. It is our view that the decision to parole or detain an excludable alien is an integral part of the admissions process and that the grant of discretionary authority to the Attorney General under 8 U.S.C. § 1182(d)(5)(A) permits the Executive to discriminate on the basis of national origin in making parole decisions.

The Executive, however, apparently contends that its parole policy does not discriminate on the basis of national origin,[3] and the new regulations adopted by the

[3] Neither the President's statement of July 30, 1981, nor the Attorney General's testimony before Congress that same day discussed the Administration's new detention policy in any detail. The President spoke only in general terms about the need to "establish control over immigration" and to ensure that foreigners are admitted into this country "in a controlled and orderly fashion." The Attorney General discussed "the necessity of detaining illegal aliens pending exclusion" and noted that "[b]y treating those who arrive by sea in the same way we have long treated those who arrive over our land borders, our policy will be evenhanded. . . ." *Hearing Before the Senate Subcomm. on Immigration and Refugee Policy and the House Subcomm. on Immigration, Refugees, and International Law*, 97th Cong., 1st Sess. 14-15 (1981) (statement of William French Smith, Attorney General) [hereinafter cited as *Hearing*]. Although some of the initiatives announced by the President and Attorney General addressed the problem of Haitian immigration—for example, the President's decision to order the Coast Guard to interdict vessels suspected of carrying undocumented aliens on the high seas, Exec. Order No. 12,324 (1981), *reprinted in* 8 U.S.C.A. § 1182 note at 71—none of these policies is at issue in this litigation.

INS during the pendency of this suit utilize facially neutral criteria. *See* 8 C.F.R. § 212.5. The question that the district court must therefore consider with regard to the remaining Haitian detainees is thus not whether high-level executive branch officials such as the Attorney General have the discretionary authority under the Immigration and Nationality Act (INA) to discriminate between classes of aliens, but whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors. *See Bertrand v. Sava*, 684 F.2d 204, 212 n. 12 (2d Cir. 1982). We remand to the district court for reconsideration of this issue in light of this opinion.

A. *Immigration and the Authority of the Political Branches*

> Every nation has the right to refuse to admit a foreigner into the country . . . . What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.

Emmerich de Vattel, *The Law of Nations* (1758).

For centuries, it has been an acceptable maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty. *Fong Yue Ting v. United States*, 149 U.S. 698, 707-11, 13 S.Ct. 1016, 1019-21, 37 L.Ed. 905 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659, 12 S.Ct. 336, 338, 35 L.Ed. 1146 (1892).[4] Although the

[4] Some courts and commentators have argued that since the Supreme Court in *Nishimura Ekiu* sought support for its expansive definition of the exclusion power in traditional international law concepts, subsequent developments in international law should affect the scope of the exclusion power. *See, e.g., Rodriguez-Fernandez*

Constitution contains no direct mandate relating to immigration matters, the Supreme Court has long recognized that the political branches of the federal government have plenary authority to establish and implement

v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (dictum); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum.L. Rev. 957, 969 n. 88 (1982). Amici urge us to adopt that position here and find that the continued detention of the Haitian plaintiffs violates the prohibition against arbitrary and indefinite punishment recognized in a number of international agreements. *See, e.g.*, Universal Declaration of Human Rights, Art. 3 ("everyone has the right to life, liberty, and the security of person") and Art. 9 ("no one shall be subjected to arbitrary arrest, detention or exile"), U.N. Doc. A/801 (1948); The American Convention on Human Rights, Part I, ch. II, Art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."), 77 Dept. of State Bull. 28 (July 4, 1977); *see also Rodriguez-Fernandez*, 654 F.2d at 1388.

The fact that the United States is a signatory to the latter document but not the former does not affect amici's argument, since they do not assert claims founded on any self-executing source of international law, but simply contend that these agreements represent part of the modern background of international law against which the dimensions of the exclusion power must be defined. Customary international law, however, derives not only from individual treaties, but from the "concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time." Hudson, *The Permanent Court of International Justice, 1920-1942* 609 (1943), *quoted in* 1 M. Whiteman, *Digest of International Law* § 6, at 75 (1963). "Arbitrary" is hardly a self-defining term, but amici have pointed to no evidence in the way of diplomatic protests, international arbitrations, or court decisions that suggest that it is current international practice to regard the detention of uninvited aliens seeking admission as a violation of customary international law. We therefore see no reason for concluding that the traditional conceptions of national sovereignty relied on by the Supreme Court in its early decisions in this area have been significantly eroded, and we note that this view is in accord with the Court's own recent pronouncements. *See, e.g., Landon v. Plasencia*, —— U.S. ——, ——, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative.").

substantive and procedural rules governing the admission of aliens to this country. *Id.*; *Chae Chan Ping v. United States* [*The Chinese Exclusion Case*], 130 U.S. 581, 609, 9 S.Ct. 623, 631, 82 L.Ed. 1068 (1889). It is worth emphasizing that while the Court could have implied the power to regulate immigration from constitutional grants of legislative powers such as the right to declare war, to approve treaties, to regulate foreign commerce, to establish a uniform rule of naturalization, and to enact all necessary and proper laws, the Court instead declared that "the control of immigration [is] an implied power arising out of national sovereignty and existing without regard to any constitutional grant." 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.2a (rev. 1982); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936) ("[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.").[5]

[5] Because this "undefined and undefinable" sovereign power does not depend on any constitutional grant of authority, there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility. *See, e.g., The Chinese Exclusion Case*, 130 U.S. at 609, 9 S.Ct. at 631; 1 C. Gordon & H. Rosenfield, *supra*, at § 2.2a; *cf. Wong Wing v. United States*, 163 U.S. 228, 237, 16 S.Ct. 977, 980, 41 L.Ed. 140 (1896) (noting that powers of the federal government with regard to aliens are more limited outside the immediate context of regulating entry). Aliens may therefore be denied admission on grounds that would be constitutionally impermissible or suspect in the context of domestic legislation. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (gender and illegitimacy); *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (political beliefs); *Nazareno v. Attorney General*, 512 F.2d 936 (D.C. Cir.) (age), *cert. denied*, 423 U.S. 832, 96 S.Ct. 53, 46 L.Ed.2d 49 (1975); *Dunn v. INS*, 499 F.2d 856 (9th Cir. 1974) (national origin), *cert. denied*, 419 U.S. 1106, 95 S.Ct. 776, 42 L.Ed.2d 801 (1975).

The political branches of the federal government therefore possess concurrent authority over immigration matters. *See Fong Yue Ting*, 149 U.S. at 713, 13 S.Ct. at 1022; *Nishimura Ekiu*, 142 U.S. at 659, 12 S.Ct. at 338. Congress may exercise its implied powers in the immigration field through its legislative powers, while the Executive has two sources of authority in this area: (1) power delegated by Congress through statutes such as the INA and (2) its inherent power, arising out of the Executive's plenary authority over foreign relations. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). Theoretically, the President has an independent source of power concerning immigration policy, at least with regard to matters that are not the subject of either a statutory mandate or an express prohibition.[6] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-37, 72 S.Ct. 863, 870-71, 96 L.Ed. 1153 (1952) (Jackson, J., concurring); *Olegario v. United States*, 629 F.2d 204, 226 (2d Cir. 1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981). In practice, however, the comprehensive character of the INA vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress. *See, e.g., Knauff*, 338 U.S. at 543, 70 S.Ct. at 312; *Fong Yue Ting*, 149 U.S. at 713, 13 S.Ct. at 1022; *Nishimura Ekiu*, 142 U.S. at 659, 12 S.Ct. at 338; *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982). The courts have instead tended to view the President's inherent powers as

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[6] In the foreign policy area, for example, the Executive's inherent powers have been held to confer authority upon the President to settle the claims of American nationals against a foreign state as part of a diplomatic agreement. *See, e.g., United States v. Pink*, 315 U.S. 203, 229-30, 62 S.Ct. 552, 565-66, 86 L.Ed. 796 (1942); *Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 809-10 (1st Cir. 1981).

a justification for permitting Congress to make remarkably broad delegations of its authority in the immigration field. As Justice Minton explained in *Knauff*, "[n]ormally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power" without raising delegation concerns. 338 U.S. at 543, 70 S.Ct. at 313; *cf. Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965); *Curtiss-Wright*, 299 U.S. at 320, 57 S.Ct. at 221 (when dealing with foreign affairs Congress may delegate a degree of discretion that would not be permissible if domestic policy alone were involved).

The sweeping delegations of congressional authority contained in the INA demonstrate that Congress has taken full advantage of the Supreme Court's invitation. The principal responsibility for immigration matters in the Executive branch resides with the Attorney General, who is the beneficiary of broad grants of discretion under the statute. The most important of these is set forth at 8 U.S.C. § 1103(a), which provides that:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as [power is delegated to other executive officials]. . . . He shall establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. . . . He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens. . . .

The INA also provides that "determination and ruling by the Attorney General with respect to all questions of

law [under the statute] shall be controlling," *id.*, and it grants the Attorney General the authority to delegate his powers under the INA to employees of the INS or other Justice Department officials. *Id.*[7] Other provisions of the INA grant broad discretionary powers to the Attorney General or his delegate with regard to the parole power, the underlying predicate of this action.[8] The Attorney General "may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States. . . ." *Id.* § 1182(d)(5)(A).

The Attorney General may be permitted the greatest degree of discretion under the INA, but other executive officials also benefit from extremely broad delegations. In the event of war or some other national emergency, the President, upon a finding that additional restrictions beyond those supplied in the statute are necessary, may issue a proclamation making it unlawful "for any alien to depart from or enter . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe. . . ." *Id.* § 1185(a)(1).[9] Section

[7] In practice, the Attorney General's authority is delegated to the Commissioner of the INS and to its regional and district directors. 2 K. Davis, *Administrative Law Treatise* § 8:10 (2d ed. 1979).

[8] The term "parole" is used by both the INS and the courts to "encompass a variety of situations in which temporary entry or stay in the United States is authorized." 1 C. Gordon & H. Rosenfield, *supra*, § 2.54. Although the temporary release of aliens seeking asylum is sometimes referred to by the technical term "deferred inspection," this word is synonymous with "parole" and the latter term is used here.

[9] This section was cited by President Carter as authority for his action delegating authority to the Secretary of State and Attorney General to apply additional restrictions to the entrance of Iranian aliens during the Hostage Crisis. *See* Exec. Order No. 12,172 (1979), *reprinted in* 8 U.S.C.A. § 1185 note at 103.

1182(f) of the INA goes even further. It empowers the President, upon a finding that "the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States," to "suspend the entry of all aliens or any class of aliens . . . or to impose on the entry of aliens any restrictions he may deem to be appropriate" for as long as he considers necessary. *Id.* § 1182(f).[10]

Despite these broad grants of authority, executive officials "function as agents of Congress in enforcing the law. . . . If such officers depart from the zone of authority charted in the statute they act illegally and their actions can be corrected in the courts." 1 C. Gordon & H. Rosenfield, *supra*, at § 2.2b; *see also, e.g., Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 335, 53 S.Ct. 167, 170, 77 L.Ed. 341 (1932) (courts may review executive action in immigration field to ensure compliance with grant of statutory authority); *Mahler v. Eby*, 264 U.S. 32, 44, 44 S.Ct. 283, 288, 68 L.Ed. 549 (1924) (warrants of deportation could not issue until executive officials made individualized findings that aliens were undesirable residents); *Gegiow v. Uhl*, 239 U.S. 3, 9, 36 S.Ct. 2, 3, 60 L.Ed. 114 (1915) ("[W]hen the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus.").[11] In practice, how-

[10] This section, along with 8 U.S.C. § 1185(a)(1), was cited as authority by President Reagan for his action ordering the Coast Guard to interdict undocumented aliens attempting to enter the southeastern United States from the high seas. *See* Proclamation No. 4865 (1981), *reprinted in* 8 U.S.C.A. § 1182 note at 72; Exec. Order No. 12,324 (1981), *reprinted in* 8 U.S.C.A. § 1182 note at 71.

[11] We realize that the Court's statement in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S.Ct. 309, 312-13, 94 L.Ed. 317 (1950), that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien," has been read by some commentators to cast doubt upon the con-

ever, the vague and sweeping language employed by Congress in these provisions permits wide flexibility in decision-making on the part of the executive officials involved, and the courts are generally reluctant to interfere. *See Saxbe v. Bustos*, 419 U.S. 65, 74, 95 S.Ct. 272, 278, 42 L.Ed.2d 431 (1974); *Knauff*, 338 U.S. at 543-44, 70 S.Ct. at 312-13.

Thus, as a result of the existence of inherent executive power over immigration and the broad delegations of discretionary authority in the INA, the separation-of-powers doctrine places few restrictions on executive officials in dealing with aliens who come to this country in search of admission or asylum. The authority of a companion branch, however, is not the only source of restraint upon executive action. We must also consider whether the Haitian plaintiffs in this case have any

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tinuing validity of these precedents. *See, e.g.*, Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv.L.Rev. 1362 (1953), *reprinted in* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *The Federal Courts and the Federal System* 351-52 & nn. 39-40 (2d ed. 1973). We note, however, that Justice Minton made this comment in the context of discussing executive action that was pursuant to the terms of a congressional delegation. Thus, his statement that judicial review of the merits of an executive decision is barred when the Executive has acted in accordance with the scope of its delegated powers does not necessarily conflict with the teaching of the earlier precedents that the judiciary can enforce executive compliance with statutory and regulatory limitations on its discretion. The Court's repeated statements that decisions by the political branches in the immigration area are "*largely* immune from judicial control," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953) (emphasis added), or are "subject only to *narrow* judicial review," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n. 21, 96 S.Ct. 1895, 1904 n. 21, 48 L.Ed.2d 495 (1976) (emphasis added), clearly do not altogether preclude judicial scrutiny, and this principle applies to executive as well as congressional action. *See Mathews v. Diaz*, 426 U.S. 67, 82, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976) (narrow standard of judicial review applies to decisions "made by the Congress *or the President* in the area of immigration") (emphasis added).

rights under the Constitution that can permit them to challenge the Executive's refusal to grant them parole.

B. *The Constitutional Rights of Excludable Aliens*

Any analysis of the constitutional rights of aliens in the immigration context must begin by taking note of the fundamental distinction between the legal status of excludable or unadmitted aliens and aliens who have succeeded in effecting an "entry" into the United States, even if their presence here is completely illegal. The Supreme Court originally indicated that the powers of the political branches with respect to the exclusion and expulsion of aliens are equally broad, *see Fong Yue Ting*, 149 U.S. at 713-14, 13 S.Ct. at 1022, but it soon recognized that "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population" is entitled to due process under the fifth amendment and cannot be deported "without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States." *Kaoru Yamataya v. Fisher* [*The Japanese Immigrant Case*], 189 U.S. 86, 101, 23 S.Ct. 611, 615, 47 L.Ed. 721 (1903).[12] While resident aliens, regardless of their legal status, are therefore entitled to at least limited due process rights, aliens "who have never been naturalized, nor acquired any domicile of residence within

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[12] Even in the deportation context, however, the Court was willing to recognize only limited rights for the alien. It held that a trial or other formal judicial hearing was not required; an administrative proceeding was satisfactory. 189 U.S. at 101, 23 S.Ct. at 614. The Court also found that the hearing provided in that case was adequate, even though "[i]t is true that [the alien] pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a 'pretended' one; and that she did not, at the time, know that the investigation had reference to her being deported from the country." *Id.* at 101-02, 23 S.Ct. at 613. Justice Harlan nevertheless concluded that "[t]hese considerations cannot justify the intervention of the courts." *Id.* at 102, 23 S.Ct. at 613.

the United States, nor even been admitted into the country pursuant to law" stand in a very different posture: "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." *Nishimura Ekiu*, 142 U.S. at 660, 12 S.Ct. at 339.

In the eighty years since the Court first recognized this distinction between the rights of excludable and deportable aliens, it has become engrained in our law. Thus, in *Leng May Ma v. Barber*, 357 U.S. 185, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958), the court emphasized that

> our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."

Id. at 187, 78 S.Ct. at 1073 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956 (1953)); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 600, 73 S.Ct. 472, 479, 97 L.Ed. 576 (1953) ("'excludable' aliens . . . are not within the protection of the Fifth Amendment"); *Bridges v. Wixon*, 326 U.S. 135, 161, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103 (1945) (Murphy, J., concurring) ("The Bill of Rights is a futile authority for an alien seeking admission for the first time to these shores."). This principle was reiterated by the Court last Term in *Landon v. Plasencia*, —— U.S. ——, ——, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982), in which Justice O'Connor noted that

> an alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.

Aliens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress. The INA does in fact contain a number of provisions that collectively guarantee at least limited due process protection for excludable aliens. Under 8 U.S.C. § 1226(a), an alien seeking entry is entitled to a hearing on the validity of his application for admission before an immigration judge. At the hearing the alien is permitted the assistance of counsel, *id.* § 1362, and has the right to present evidence in his own behalf, to examine and object to evidence against him, and to cross-examine witnesses presented by the government. 8 C.F.R. § 236.2(a). If the immigration judge determines that the alien is not entitled to admission, this decision may be appealed to the Board of Immigration Appeals (BIA). 8 U.S.C. § 1226(b); 8 C.F.R. § 236.7. An alien may also challenge a final order of exclusion in the federal courts by filing a petition for a writ of habeas corpus. 8 U.S.C. § 1105a(b).

The process of determining the merits of an alien's application for admission is frequently a lengthy one, particularly when the alien is able to hire a skilled immigration lawyer. *Louis III*, 544 F.Supp. at 978. Because the carriers that bring aliens seeking admission to this country can rarely afford to wait until this process is concluded, Congress recognized that it was necessary to permit aliens to make a temporary, unofficial entry into the United States pending the resolution of their applications. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215, 73 S.Ct. 625, 631, 97 L.Ed. 956 (1953); 8 U.S.C. § 1223(a) (removal of alien from vessel or aircraft for examination by immigration officials

"shall not be considered a landing"); *id.* § 1225(b) (alien who does not appear to examining immigration officer to be "clearly and beyond a doubt entitled to land" may be detained for further inquiry); *id.* § 1182(d)(5)(A) (granting authority to the Attorney General to parole aliens seeking admission into the United States, but providing that "such parole of such alien shall not be regarded as an admission of the alien").

The Supreme Court has consistently rejected claims that the parole or detention of an excludable alien has any effect on his status under the law. Thus, in *Leng May Ma*, Justice Clark noted that "[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." 357 U.S. at 188, 78 S.Ct. at 1074. Likewise, he explained that "[t]he parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status. . . ." *Id.* at 190, 78 S.Ct. at 1075; *see also Mezei*, 345 U.S. at 215, 73 S.Ct. at 631 (alien permitted to enter pending a decision on admissibility "is treated as if stopped at the border"); *Kaplan v. Tod*, 267 U.S. 228, 230-31, 45 S.Ct. 257, 257-58, 69 L.Ed. 585 (1925); *United States v. Ju Toy*, 198 U.S. 253, 263, 25 S.Ct. 644, 646, 49 L.Ed. 1040 (1905); *Nishimura Ekiu*, 142 U.S. at 661, 12 S.Ct. at 339. This principle—the "entry doctrine" fiction—has been recognized as well by the fifth circuit. *Ahrens v. Rojas*, 292 F.2d 406, 410-11 (5th Cir. 1961).

There is no question that the Haitian plaintiffs in this case are excludable aliens and have not been formally admitted into the United States. *Louis III*, 544 F.Supp. at 998. Since an alien's legal status is not altered by detention or parole under the entry doctrine fiction, it seems clear that plaintiffs here can claim no greater rights or privileges under our laws than any other group of aliens

who have been stopped at the border. The district court, however, concluded that the entry doctrine and the precedents cited above were inapplicable because the Haitian plaintiffs here are challenging their continued incarceration *pending* a determination of admissibility, rather than seeking to compel the government to grant them admission in a legal sense. *Louis III*, 544 F.Supp. at 998. Likewise, the panel distinguished *Mezei* and other immigration decisions on the grounds that those cases concerned "immigration procedures" rather than "the discretionary exercise of the Executive's parole power." *Jean*, 711 F.2d at 1484-85. The panel also considered the entry doctrine inapplicable because "its purpose [is] to limit the procedural rights of an excludable alien 'regarding his application' for admission," *id.* at 1484 (quoting *Plasencia*, —— U.S. at ——, 103 S.Ct. at 329), and therefore concluded that the Haitian plaintiffs had equal protection rights on the basis of their physical presence within the territorial limits of the United States. *See id.* 1484-85.[18]

Although the distinction between parole and admission drawn by the panel and the district court is not an implausible one, we conclude that it cannot be reconciled with the Supreme Court's jurisprudence in this area. In particular, we believe that the Court's decision in *Mezei*

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[18] Appellees, quoting *Leng May Ma*, 357 U.S. at 187, 78 S.Ct. at 1073, also contend that the entry doctrine is not controlling because it "is not of constitutional origin. It 'is wholly one of statutory construction.'" This argument is disingenuous. The *Leng May Ma* court did not say that the entry doctrine itself is applicable only to matters of statutory construction; it said that the question in the particular case before it—which turned on the meaning of the phrase "within the United States" under the old wording of 8 U.S.C. § 1253(h), providing for discretionary relief from deportation—was one of statutory construction. The Supreme Court has in fact applied the entry doctrine in a number of cases in which the plaintiff's claim turned wholly on an alleged deprivation of liberty in violation of the fifth amendment. *See Mezei*, 345 U.S. at 209, 213, 73 S.Ct. at 627, 629; *Ju Toy*, 198 U.S. at 263, 25 S.Ct. at 646; *Nishimura Ekiu*, 142 U.S. at 664, 12 S.Ct. at 340.

is controlling on this issue and that a close examination of the facts at issue in *Mezei* forecloses us from relying on the arguments that the panel and the district court found persuasive. Thus, we cannot accept appellees' argument that *Mezei* is not on point because "the alien was challenging non-admissibility, not incarceration." The gravamen of Mezei's complaint was clearly not the government's right to exclude him—a permanent exclusion order had already been entered in his case, and he did not contest it in his habeas petition—but the power of the government to continue to detain him without a hearing pending his deportation. *See Mezei*, 345 U.S. at 207, 73 S.Ct. at 627. Justice Clark stated explicitly in his majority opinion that "[t]he issue is whether the Attorney General's continued exclusion of respondent without a hearing *amounts to an unlawful detention*, so that courts may admit him *temporarily* to the United States on bond until arrangements are made for his departure abroad." *Id.* (emphasis added).

Mezei thus did not concern admission or exclusion *per se*, but the rights of an alien when challenging his continued detention pending the enforcement of an exclusion order that has been entered against him. Since the Supreme Court applied the entry doctrine fiction under these circumstances, *see id.* at 215, 73 S.Ct. at 631, squarely rejecting the territorial argument advanced by the second circuit majority,[14] the doctrine's applicability clearly is

[14] The second circuit majority, like the panel and the district court here, reasoned on the basis of *Yick Wo v. Hopkins* that the fifth amendment "is not confined to the protection of citizens. . . . [Its guarantees] extend in fact to all whose presence here brings them within reach of the judicial and administrative processes of the United States Government." *United States ex rel. Mezei v. Shaughnessy*, 195 F.2d 964, 967 (2d Cir. 1952), *rev'd*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). Because Mezei's temporary refuge on Ellis Island was within the territorial limits of the United States, the second circuit concluded that he could claim rights under the fifth amendment with regard to his request for temporary admission on bond. As we have seen, the Supreme Court subsequently rejected this reasoning, which is virtually identical to the argument presented by appellees here.

not limited to challenges relating to the admission decision itself.[15] *See also Pierre v. United States*, 547 F.2d 1281, 1283, 1289-90 (5th Cir.) (entry doctrine fiction applied to aliens seeking parole pending decision on petition for asylum), *vacated and remanded to consider mootness*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977); *Ahrens v. Rojas*, 292 F.2d at 408-11 (entry doctrine bars excludable alien from claiming fifth amendment right to a hearing on the revocation of his parole). We therefore conclude that *Mezei* compels us to hold that the Haitian plaintiffs in this case cannot claim equal protection rights under the fifth amendment, even with regard to challenging the Executive's exercise of its parole discretion.[16]

[15] Although the panel quotes *Landon v. Plasencia* in support of its contention that the entry doctrine fiction applies only to the admission decision, *see Jean*, 711 F.2d at 1481, a reading of the entire case does not support this view. Plaintiff in *Plasencia* was a resident alien who left the country for a few days and was stopped at the border while seeking to smuggle illegal aliens on her return. —— U.S. at ——, 103 S.Ct. at 324. The Supreme Court ruled that plaintiff was entitled only to an exclusion proceeding, not a deportation hearing, but nonetheless permitted her to claim limited due process rights. *Id.* at ——, 103 S.Ct. at 329-30. *Plasencia* is therefore similar to *Kwong Hai Chew*, where the Court found that a resident alien who had spent several months abroad as a seaman on an American-flag vessel had not departed the country in a legal sense. 344 U.S. at 600, 73 S.Ct. at 479. The Court never mentions the entry doctrine in *Plasencia*; its opinion "is ambiguous regarding whether the alien was within or without the territory of United States. . . . [The Court] neither relied on [the territoriality] rationale nor even addressed the issue of physical presence." *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 Harv.L.Rev. 1286, 1321 n. 48 (1983) [hereinafter cited as *Developments*]. Thus, if *Plasencia* implicated any legal fiction, it is an "exit doctrine" under which resident aliens may physically leave the country without departing in a legal sense, rather than the entry doctrine, which is generally applied to excludable aliens.

[16] In addition to the arguments discussed above, appellees offer a variety of other reasons for distinguishing *Mezei* from this case—

We realize, of course, that *Mezei*—like its predecessor, *Knauff*—has been heavily criticized by academic commentators.[17] As an intermediate appellate court, however, we cannot properly question the continued authority of this Supreme Court precedent—a precedent that the Court cited without reconsideration as recently as last Term. *See Plasencia*, —— U.S. at ——, 103 S.Ct. at 329. With regard to the key issue here—whether the grant or denial of parole is an integral part of the admissions process—*Mezei* is fully in accord with other, less controversial precedents. As far back as 1896 the Supreme Court approved the validity of detention

> as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens. . . . Proceedings to exclude or expel would be vain if those accused could not be held in custody pending

that *Mezei* involved national security considerations, that it was not an asylum case, that it did not involve discrimination on the basis of national origin, and that the Attorney General at the time had no statutory authority to parole aliens. We find these distinctions no more persuasive than the other arguments advanced by appellees. Any broad conception of "national security" must surely include the ability to regulate entry into a country, and the Supreme Court has made it clear that the standard of review in immigration cases is not affected by "the nature of the policy choice at issue." *Fiallo*, 430 U.S. at 796, 97 S.Ct. at 1480. Similarly, the character of parole is essentially the same regardless of the ultimate claim the alien has raised, *see* 1 C. Gordon & H. Rosenfield, *supra*, at § 2.54, so the fact that Mezei was not seeking asylum is also not significant. The important point is that, like petitioners in this case, he was seeking temporary admission into the United States. Although there are obviously some factual differences between the two cases, the similarity between the nature of the claims presented and the legal status of the plaintiffs is sufficient to conclude that *Mezei* is controlling.

[17] *See, e.g.*, 2 K. Davis, *supra* note 7, § 11:5 ("The holding that a human being may be incarcerated for life without opportunity to be heard on charges he denies is widely considered to be one of the most shocking decisions the Court has ever rendered."); *Developments*, *supra* note 15, 96 Harv.L.Rev. at 1322-24.

> the inquiry into their true character, and while arrangements were being made for their deportation.

Wong Wing v. United States, 163 U.S. 228, 235, 16 S.Ct. 977, 980, 41 L.Ed. 140 (1896); *see also Carlson v. Landon*, 342 U.S. 524, 538, 72 S.Ct. 525, 533, 96 L.Ed. 547 (1952) ("Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").[18]

These decisions reflect policy imperatives and fundamental principles of national sovereignty that cannot be easily dismissed, regardless of the individual merits of the Court's decisions in *Knauff* and *Mezei*.[19] The reason that Congress has passed legislation regulating the admission of aliens is its concern about how their entry will affect the economic, political, and social well-being of this nation. The grant of parole is subject to certain restric-

[18] Although appellees raise a variety of arguments in an effort to distinguish *Carlson*, the point made by the passage quoted above is a matter of simple common sense that clearly does not depend on the precise statutory predicate involved. While the harm feared from the aliens taken into custody under the Internal Security Act in *Carlson* may be of a different character from that feared in this case, the essential point remains the same—that if aliens can claim that they have a constitutional right to due process regarding temporary release pending a final determination in their cases, the government's ability to control "entry" into this country is severely eroded.

[19] It is worth pointing out in this context that much of the criticism of *Mezei* and *Knauff* has focussed on the fact that the aliens who were ordered excluded without a hearing in those cases had strong personal or family ties to the United States. *See Mezei*, 345 U.S. at 216-17, 73 S.Ct. at 631-32 (Black, J., dissenting); *Knauff*, 338 U.S. at 539, 70 S.Ct. at 310. Most excludable aliens have far weaker claims to enjoying the benefits of admission into this country, however, and the harsh results of *Knauff* and *Mezei* should not obscure the compelling policy justifications that support the entry doctrine fiction and the general principle that excludable aliens have no rights with regard to their applications for admission or parole.

tions and is theoretically of a short-term character,[20] but it does permit the physical entry of the alien into the midst of our society and implicates many of the same considerations—such as employment and national security concerns—that justify restrictions on admission. Parole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air. Judge Learned Hand emphasized this point in his dissent to the second circuit's decision in *Mezei*, stating:

> I do not believe that an alien so situated can force us to admit him at all. Suppose . . . that the respondent had refused to let him leave the ship. I do not see what legal process Mezei could have invoked to get ashore before she left; nor do I see what theory supports the claim that, because we did not impose upon him this harsher alternative, but *ex gratia*, allowed him to land until his case was decided, we must grant him even a limited version of that entry which the statute denies him. For we must remember that the order [releasing Mezei upon bond] does give him a privilege of entry. . . . Moreover, although that privilege is hedged about in various ways, he will be able nevertheless to mingle with the mass of citizens.

United States ex rel. Mezei v. Shaughnessy, 195 F.2d 964, 970-71 (L. Hand, J., dissenting) (1952). We follow Judge Hand and the Supreme Court in concluding that since the immediate implications of parole and legal admission are identical in a number of important respects,

[20] The reality can be quite different. The grant of parole authority to the Attorney General under 8 U.S.C. § 1182(d)(5)(A) places no time limitation on parole; moreover, an alien with a skilled attorney can delay the exclusion process for years, and aliens who choose to abscond face only a minimal risk of apprehension.

excludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right.

Of course, there are certain circumstances under which even excludable aliens are accorded rights under the Constitution. Appellees seize on these exceptions as a basis for denying the validity of the entry doctrine fiction entirely, asserting that "[t]he critical factor in determining whether the Fifth Amendment applies is not the citizenship or immigration status of the person, but the mere fact of government action. . . . [T]he Constitution limits the power of government whenever, wherever, and upon whomever the government acts." If this view were correct, all aliens in all circumstances would presumably be entitled to the full range of constitutional protections. This is clearly not the case. Instead, the courts have made it plain that the degree of constitutional protection accorded an alien in a particular situation is to be determined by such factors as the legal status of the alien and the context of the government action he seeks to challenge. For example, those with the status of deportable aliens are constitutionally entitled to rights in the deportation context that are inapplicable to exclusion proceedings. Illegal or resident aliens may also claim other rights under the fifth and fourteenth amendments. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).[21]

The courts have also recognized that aliens can raise constitutional challenges to deprivations of liberty or property outside the context of entry or admission, when

[21] These cases, as well as *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896), were cited by appellees in support of their argument that excludable aliens have rights under the fifth amendment. In fact, each concerned resident aliens.

the plenary authority of the political branches is not implicated. Aliens seized by United States officials for suspected involvement in criminal activity are entitled to the same constitutional rights that normally apply in such proceedings. *See, e.g., Wong Wing*, 163 U.S. at 238, 16 S.Ct. at 981 ("[A]liens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."); [22] *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) ("[A]n alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior, in a proper case and at the proper time, is entitled to those protections guaranteed by the Fifth Amendment in criminal proceedings which would include the *Miranda* warning."). The courts have further ruled that aliens who are the victims of unconstitutional government action abroad are protected by the Bill of Rights if the government seeks to exploit fruits of its unlawful conduct in a criminal proceeding in the United States. *United States v. Demanett*, 629 F.2d 862, 866 (3d Cir.), *cert. denied*, 450 U.S. 910, 101 S.Ct. 1347, 67 L.Ed.2d 333 (1980); *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974); *cf. United States v. Tiede*, 86 F.R.D. 227, 242-44 (U.S. Ct. for Berlin 1979) (protections of Bill of Rights apply to friendly aliens in the American sector of West Berlin). The Supreme Court has also recognized that even non-resident aliens are entitled to

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[22] Although *Wong Wing* could be distinguished on the grounds that it involved resident aliens, it was decided before *The Japanese Immigrant Case* distinguished between the degree of legal protection enjoyed by deportable and excludable aliens and therefore speaks in terms of general applicability. *See* 163 U.S. at 237, 16 S.Ct. at 980; *Developments, supra* note 15, 96 Harv.L.Rev. at 1316 n. 20. We believe that its basic principle—that criminal punishment may not be imposed without due process protections—is relevant to excludable aliens and see no reason to reconsider this court's decision in *United States v. Henry*, 604 F.2d 908 (5th Cir. 1979).

the protection of the fifth amendment's prohibition on unlawful takings. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489, 491-92, 51 S.Ct. 229, 232, 75 L.Ed. 473 (1931).

These authorities, however, do not mandate the conclusion that excludable aliens such as the Haitian plaintiffs can claim equal protection rights under the fifth amendment with regard to parole. *Russian Volunteer Fleet* can be distinguished because it clearly does not implicate in any way the powers of the national government over immigration. When the government seizes the property of foreign nationals within this country, its actions do not fall within a sphere of plenary executive and legislative authority, and it therefore cannot claim that the aliens involved are entitled only to the degree of due process that Congress is prepared to extend them as a matter of grace.

Similar considerations apply in the context of criminal prosecutions. When the government subjects an alien to the criminal process it is plainly no longer seeking to effectuate its power to control admission into the United States by removing the alien from this country. The arrests of the aliens in *Wong Wing* and *Henry* may have grown out of the Executive's efforts to control the entry of foreigners into the United States,[23] but the decision by government officials to subject them to criminal prosecution or punishment, rather than deportation, completely changed the nature of the proceedings. From that point forward any action taken by the government derived not from its power to control admission into this country, but from the powers of the Executive over law enforcement. The government's actions in prosecuting Henry and imprisoning Wong Wing therefore fell outside the plenary

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[23] The aliens in *Wong Wing* were imprisoned under a statute that made illegal residence within the United States by Chinese aliens a crime. 163 U.S. at 233-34, 16 S.Ct. at 979-80. In *Henry* the alien was charged with falsely representing himself to be an American citizen. 604 F.2d at 910.

power to control immigration that justifies the extraordinary executive and congressional latitude in that area. This critical distinction was emphasized by the Court in *Wong Wing*:

> No limits can be put by the court upon the power of congress to protect, *by summary methods*, the country from the advent of aliens. . . . But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.

163 U.S. at 237, 16 S.Ct. at 981 (emphasis added). Similarly, the fifth circuit in *Henry* stressed that the excludable alien in that case "was entitled to the rights guaranteed by the Fifth Amendment, including the *Miranda* warning, *only* when the questioning of the immigration officials became an interrogation that was custodial in nature in which information was sought for the purpose of using it against him in a criminal proceeding." 604 F.2d at 914 (emphasis added).

These holdings reflect the Supreme Court's recognition of a significant distinction between the degree of due process protection implicated by statutory provisions that "contemplate only the exclusion or expulsion of [aliens] and those which provide for their imprisonment at hard labor, pending which their deportation is suspended." *Wong Wing*, 163 U.S. at 236, 16 S.Ct. at 980. This principle is also reflected in Supreme Court decisions holding that the full panoply of due process rights is not applicable in deportation proceedings because they are not criminal in character. *See, e.g., Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954); *Fong Yue Ting*, 149 U.S. at 730, 13 S.Ct. at 1028.[24]

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[24] For example, aliens may be arrested without a warrant for deportation, *Abel v. United States*, 362 U.S. 217, 233-34, 80 S.Ct. 683, 694-95, 4 L.Ed.2d 668 (1960), and may be deported for illegal behavior that occurred before Congress outlawed it since deportation is not considered "punishment" under the ex post facto clause of the Constitution, *see Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95, 72 S.Ct. 512, 521-22, 96 L.Ed. 586 (1952).

Some courts and commentators have suggested that when an exercise of the government's power to exclude results in an indefinite detention of an excludable alien, at some point the continued imprisonment becomes punishment, regardless of the legal justifications or fictions involved. These authorities contend that at this juncture the government should be required to make some justification to continue to detain the alien. *See, e.g., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981); *Soroa-Gonzalez v. Civiletti*, 515 F.Supp. 1049, 1056 n. 6 (N.D.Ga.1981); *Fernandez-Roque v. Smith*, 91 F.R.D. 239, 243 (N.D.Ga.1981), *appeal dismissed*, 671 F.2d 426 (11th Cir.1982); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum.L.Rev. 957, 980 (1982); Note, *The Constitutional Rights of Excluded Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees*, 70 Geo.L.J. 1303, 1306 (1982). In *Rodriguez-Fernandez*, for example, the tenth circuit ruled that detention of excludable aliens "is permissible during proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return to the country of origin. . . ." After that time, the alien is entitled to release unless the government can demonstrate "that the detention is still temporary pending expulsion, and not simply incarceration as an alternative to departure." 654 F.2d at 1389-90.[25]

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[25] *Cf. Fernandez-Roque*, 91 F.R.D. at 243 (pending exclusion hearings, the continued detention of aliens who are not likely to be returned to their country of origin, who have committed no crimes in the United States, who are not a threat to national security or the public interest, and who were invited to this country by the President, "constitutes an abuse of discretion of the parole authority").

We could distinguish *Rodriguez-Fernandez* from this case on the grounds that the former involved an alien against whom an exclusion order had already been entered and who was clearly unable to return to his country of origin.[26] Indeed, the tenth circuit placed no time limits on the government's ability to detain excludable aliens pending the admission decision. *Id.* at 1389. Nevertheless, we detect two significant problems that prevent us from endorsing the tenth circuit's reasoning. The first—which is controlling from our point of view—is that it cannot be reconciled with the Supreme Court's decision in *Mezei*, which held that an excludable alien could not challenge his continued detention without a hearing. The second difficulty is that if the prospect of indefinite detention is held to be sufficient to require the government to meet some judicially-imposed standard to continue to detain an alien, the plenary authority of the political branches in the exclusion area is largely rendered nugatory. The prospect of indefinite confinement, after all, can be raised by the refusal of an excludable alien to return home, or the refusal of his country of origin or any other country to accept him.

This is the critical flaw with the second circuit's decision in *Mezei* and the tenth circuit's decision in *Rodriguez-Fernandez*, each of which based the alien's right to challenge his continued confinement on whether or not he had a foreseeable chance of being able to go elsewhere. At first glance, this is an attractive solution. It seems both humane and eminently realistic, because it does not turn on legal fictions and distinctions that appear to lack practical substance. Unfortunately, this approach would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant

[26] Haiti has indicated that it is willing to accept the return of these aliens. *Hearing, supra* note 3, at 11. Although plaintiffs contend that they fear prosecution if they return to Haiti, its government has denied that they would be subject to any reprisals.

physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back. In the probable absence of any reliable information about such aliens beyond what they cared to provide, could the government meet its burden under some judicially-imposed standard of showing that indefinite detention was justified? It seems unlikely.

Mindful of the Supreme Court's warning that "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution," *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976), we conclude that we must resist the temptation to tamper with the authority of the Executive by ruling that excludable aliens have constitutional rights in this area, even with regard to their applications for parole.

C. *Judicial Review of Executive Discretion*

Although we hold that the Haitian plaintiffs cannot challenge the refusal of executive officials to parole them on the basis of the fifth amendment's equal protection guarantee, this is not the end of our inquiry. That the authority of the political branches in this area is plenary does not mean that it is wholly immune from judicial review. As two leading commentators have noted, the Executive's discretionary authority concerning parole decisions "is broad, but not unlimited. It may be subjected to judicial scrutiny on a charge that discretion was arbitrarily exercised or withheld." 1 C. Gordon & H. Rosenfield, *supra*, at § 2.54. This principle has been recognized by our colleagues on the second and fourth circuits, who have held that an executive official's decision to deny parole to an unadmitted alien may be subject to judicial review for abuse of discretion. *Bertrand v. Sava*, 684 F.2d 204, 210 (2d Cir. 1982); *Palma v. Verdeyen*, 676 F.2d 100, 105 (4th Cir. 1982); *see also Pierre*, 547 F.2d at 1289.

Bertrand in particular presents a fact situation highly similar to that at issue in this case. The Haitian plaintiffs in *Bertrand* alleged that the INS district director discriminated against them in the exercise of his parole authority, and contended that his action constituted an abuse of discretion since he did not claim to act pursuant to any national policy adopted by the political branches of the federal government. The second circuit concluded that it did have the authority to review the decisions of the district director, reasoning that:

> Discretion vested by statute in agents of the federal government is rarely, if ever, entirely free from judicial review for abuse. The principle that discretionary power is not absolute power is fundamental to our constitutional form of government. The discretionary power to parole unadmitted aliens granted by statute to the Attorney General, and delegated by him to INS District Directors, is broad, but it is not without limits.

684 F.2d at 210.

The district court below reached a similar destination by a different route, suggesting that "[p]laintiffs are persons within the territorial jurisdiction of the United States and they cannot be denied their liberty without due process of law." *Louis III*, 544 F.Supp. at 990. We have rejected the argument that the entry doctrine fiction is inapplicable in the context of parole decisions, so we conclude that the district court erred to the extent that it based its jurisdiction to review these determinations on constitutional grounds. The basis for jurisdiction here must be found elsewhere, in the principle that agencies must respect the statutory limits on their discretion, *see, e.g., Lloyd Sabaudo*, 287 U.S. at 335, 53 S.Ct. at 170; *Mahler*, 264 U.S. at 44, 44 S.Ct. at 288; *Gegiow*, 239 U.S. at 9, 36 S.Ct. at 3; *see also supra* note 11, and in the recognition that "agency deviation from its own regulations

and procedures may justify judicial relief in a case otherwise properly before the court." *Haitian Refugee Center v. Smith* [*HRC*], 676 F.2d 1023, 1041 n. 48 (5th Cir. Unit B 1982);[27] *see also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S.Ct. 499, 503, 98 L.Ed. 681 (1954).

The discretionary decisions of executive officials in the immigration area are therefore subject to judicial review, but the scope of that review is extremely limited. The Supreme Court has repeatedly emphasized that "the power over aliens is of a political character and therefore subject only to narrow judicial review." *Mow Sun Wong*, 426 U.S. at 101 n. 21, 96 S.Ct at 1904 n. 21; *see also Fiallo v. Bell*, 430 U.S. 787, 793 n.5, 97 S.Ct. 1473,

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[27] The district court's conclusion that petitioners here could claim rights under the fifth amendment was at least partially based on this court's decision in *HRC v. Smith*, in which the court stated that "[w]e therefore find sufficient legal warrant under the fifth amendment for . . . requiring the government to submit a procedurally fair plan for the orderly reprocessing of the plaintiffs' asylum applications." 676 F.2d at 1041. The *HRC* panel also stated, however, that "we conclude that the district court properly exercised its jurisdiction under 8 U.S.C. § 1329 to order the government to submit a reprocessing plan which adheres to INS regulations and operating procedures," regardless of "[w]hether or not these procedures are mandated by the due process guarantee." *Id.* at 1041 n. 48. The *HRC* panel's decision turned on its finding that although "Congress and the executive have created . . . a constitutionally protected right to petition our government for political asylum," *id.* at 1038, INS officials attempting to cope with a backload of cases had deliberately "created conditions which negated the possibility that a Haitian's asylum hearing would be meaningful in either its timing or nature. Under such circumstances, the right to petition for political asylum was effectively denied." *Id.* at 1040. *HRC v. Smith* therefore falls into the category of those cases in which judicial relief is mandated by "agency deviation from its own regulations and procedures," *id.* at 1041 n. 48, and the court's finding that the agency had acted in violation of its statutory obligations was a sufficient basis for the court's holding. To the extent that *HRC* may be read to conflict with our decision in this case, the applicable language in *HRC* is disapproved.

1478 n. 5, 52 L.Ed.2d 50 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution . . . . with respect to the power of Congress to regulate the admission and exclusion of aliens. . . ."). Because the political branches share concurrent authority over immigration matters, it follows that both executive and congressional actions are to be regulated by the judiciary according to the same narrow standard of review. *See Mathews v. Diaz*, 426 U.S. at 81-82, 86 S.Ct. at 1892-1893 ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by Congress *or the President* in the area of immigration . . . .") (emphasis added); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952) (immigration matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference") (emphasis added).

The Supreme Court's ruling in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) underlines the judiciary's limited role in reviewing the discretionary decisions of executive officials in the immigration field. In that case the Court considered a challenge to the Attorney General's refusal to grant a waiver permitting a foreign Marxist to visit the United States on a lecture tour. Although the first amendment rights of American citizens were implicated by the Attorney General's decision, the Court held that "when the Executive exercises this [delegated] power negatively on the basis of *a facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770, 92 S.Ct. at 2585 (emphasis added). Similarly, the second circuit stressed in *Bertrand* that

> as long as the Attorney General exercises his broad discretion under 8 U.S.C. § 1182(d)(5) to determine whether unadmitted aliens may be paroled pending final determination of their applications for admission to the United States, his decision may not be challenged on the grounds that the discretion was not exercised fairly in the view of a reviewing court or that it gave too much weight to certain factors relevant to the risk of abscondence and too little to others.

684 F.2d at 212.[28]

Thus, under the approach taken by the Supreme Court in *Kliendienst v. Mandel* and adopted by the second circuit in *Bertrand*, the critical question a court must answer when reviewing an alien's challenge to the denial of his request for parole is whether the immigration officials involved were acting within the scope of their delegated powers. As we noted in section II.A. above, Congress has delegated remarkably broad discretion to executive officials under the INA, and these grants of statu-

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[28] Appellees contend that the present case involves no national security or foreign policy considerations and therefore assert that the actions of executive officials here warrant more searching judicial scrutiny than has been applied in other immigration cases in the past. In *Fiallo v. Bell*, however, the Court squarely rejected a similar attempt to distinguish prior decisions in the immigration field as relating to national security or foreign policy matters, stating that "[w]e find no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue." 430 U.S. at 796, 97 S.Ct. at 1480. In addition, the Supreme Court has long recognized that the exclusion process is intimately related to considerations of both national security and foreign policy. *See, e.g., Harisiades*, 342 U.S. at 588-89, 72 S.Ct. at 519 ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . ."); *The Chinese Exclusion Case*, 130 U.S. at 606, 9 S.Ct. at 630 (noting that threats to national security can come both "from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us"). We therefore see no reason for concluding that the traditional justifications for recognizing wide latitude for executive decisionmaking in this field are inapplicable here.

tory authority are particularly sweeping in the context of parole. In exercising his parole discretion, the Attorney General is simply instructed that he "may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission. . . ." 8 U.S.C. § 1182(d)(5)(A). Logically, of course, "the obverse of the grant of discretionary authority in § 1182(d)(5) to parole an excluded alien is a grant of authority to deny parole." *Palma*, 676 F.2d at 104. This grant can certainly be inferred from 8 U.S.C. § 1225(b), which provides that immigration officials shall detain "[e]very alien . . . who may not appear . . . to be clearly and beyond a doubt entitled to land", and 8 U.S.C. § 1227(a), which permits the Attorney General to continue to detain an excluded alien if he concludes that "immediate deportation is not practicable or proper." [29] In view of these provisions, immigration officials clearly have the authority to deny parole to unadmitted aliens if they can advance "a facially legitimate and bona fide reason" for doing so.

The Haitian plaintiffs contend that such a reason was lacking in this case, submitting that they were the victims of national origin discrimination. Plaintiffs and the district court both stressed that the challenged actions here were those of executive officials rather than Congress, apparently believing that the Executive is clearly prohibited from adopting policies on its own motion that discriminate on the basis of national origin in the immigration field while Congress is just as clearly permitted to do so. Because the government has contended throughout this case that its new detention policy does not discriminate on the basis of national origin, resolution of

[29] No time limit is put upon the Attorney General's authority to detain an alien under § 1227(a). In contrast, § 1252(c) limits detention of a *resident* alien subsequent to the entry of a final order of deportation to six months.

this question is not essential to our holding; however, we believe that responsible executive officials such as the President or Attorney General possess this authority under the INA.[30] Nevertheless, since the discretion of lower-level immigration officials is circumscribed not only by legislative enactments but also by the instructions of their superiors in the executive branch, our conclusion that the Executive's policy is consistent with the power delegated

[30] In view of the Supreme Court's repeated emphasis on the concurrent nature of executive and legislative power in this area and the sweeping congressional delegations of discretionary authority to the Executive under the INA, there is little question that the Executive has the power to draw distinctions among aliens on the basis of nationality. This issue was squarely presented to the D.C. Circuit in *Narenji v. Civiletti*, 617 F.2d 745 (D.C.Cir. 1979), *cert. denied*, 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980), in which the court upheld a regulation requiring nonimmigrant alien post-secondary school students of Iranian citizenship or birth to provide information to the INS concerning their residence and academic status. The court held that the challenged regulation was within the Attorney General's authority under 8 U.S.C. § 1103(a), which permits the Attorney General to "perform such other acts as he deems necessary" for carrying out his responsibility to administer and enforce the immigration laws, and concluded that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. [Citations omitted]. So long as such distinctions are not wholly irrational they must be sustained." 617 F.2d at 747.

Although Congress significantly altered the system of nationality-based quotas for the issuance of immigration visas in 1965, *see* 1 C. Gordon & H. Rosenfield, *supra*, at § 1.4c, it has not disturbed a variety of administrative provisions that distinguish among aliens on the basis of national origin. *See, e.g.*, 8 C.F.R. § 101.1 (presumption of lawful admission for certain national groups); *id.* § 212.1 (documentary requirements for nonimmigrants of particular nationalities); *id.* § 252.1 (relaxation of inspection requirements for certain British and Canadian crewmen). The courts have generally viewed such classifications as within the permissible scope of executive discretion. *See, e.g., Nademi v. INS*, 679 F.2d 811 (10th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 161, 74 L.Ed.2d 134 (1982); *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980).

by Congress does not end the process of judicial inquiry here. The district court must still determine whether the actions of lower-level officials in the field conform to the policy statements of their superiors in Washington. For as the second circuit correctly noted in *Bertrand*:

> [T]he constitutional authority of the political branches of the federal government to adopt immigration policies based on criteria that are not acceptable elsewhere in our public life would not permit an immigration official, in the absence of such policies, to "apply neutral regulations to discriminate on [the basis of race and national origin]."

684 F.2d at 212 n. 12 (quoting *Vigile v. Sava*, 535 F. Supp. 1002, 1016 (S.D.N.Y. 1982)).

The district court on remand should conduct such proceedings as are necessary to determine whether there exists a facially legitimate and bona fide reason for the government's decision to deny parole to the class members presently in detention, remembering that it is not the court's proper role "to disregard the [stated criteria employed] or to substitute its own policy preferences for those of the official vested by law with discretionary authority to act on requests for parole." *Id.* at 217. The district court should consider (1) whether local immigration officials in fact exercised their discretion under § 1182(d)(5)(A) to make individualized determinations and (2) whether the criteria employed in making those determinations were consistent with the statutory grant of discretion by Congress, the regulations promulgated by the agencies involved, and the policies which had been established by the President and the Attorney General. If the court should find that low-level immigration officials have discriminated on the basis of national origin despite the adoption of a contrary policy by their superiors in the executive branch, such conduct would constitute an abuse of discretion that would justify appropriate relief. Without expressing any opinion on this score, we note that the district court may wish to reconsider whether class treatment is still an appropriate vehicle for making the determinations set forth above. We therefore remand for further proceedings in light of this opinion.

III. NOTICE OF THE RIGHT TO SEEK ASYLUM

Plaintiffs also contend that the class members are entitled to notice of their right to present a claim to the district director for political asylum under the Refugee Act of 1980 and its attendant regulations. The district court dismissed this claim on the grounds that it would "merge" into a final order of exclusion and was therefore subject to review only on habeas corpus pursuant to 8 U.S.C. § 1105a. *Louis v. Meissner* [*Louis II*], 532 F. Supp. 881, 888-89 (S.D.Fla. 1982). We conclude that neither the finality provision nor the exhaustion requirement of § 1105a bars review of this claim and therefore reach the merits, holding that plaintiffs do not have a right to be notified of the opportunity to seek asylum provided by the Refugee Act of 1980.

A. *The Jurisdictional Issue*

The first question we must resolve is whether this court can properly reach the notice issue in the absence of a final order of exclusion. The problematic statutory authority here is 8 U.S.C. § 1105a, which provides in relevant part:

> (b) Notwithstanding the provisions of any other law, any alien against whom a *final* order of exclusion has been made heretofore or hereafter . . . may obtain judicial review of such order by habeas corpus proceedings *and not otherwise.*
>
> (c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him

> as of right under the immigration laws and regulations. . . .

(emphasis added). Because plaintiffs in this case have not yet undergone exclusion hearings, the district court was confronted with the question whether § 1105a(b) applies only to final orders of exclusion or whether it also precludes review of challenges to preliminary procedures employed in exclusion proceedings prior to the entry of a final order. The district court concluded that the provisions of the statute are "ambiguous and unclear" in this regard and sought additional guidance by scrutinizing the legislative history of § 1105a. Finding that "Congress' intent in enacting Section 1105a was to end the seemingly endless procedural delays that allowed an excludable or deportable alien to prolong his departure from this country," the district court reasoned that "[i]t is inconceivable to believe that Congress would legislate against the delays that can follow the entry of a final order of exclusion without intending to cut off similar dilatory practices that might be utilized prior to the entry of an order." *Louis II*, 532 F.Supp. at 886-87. The lower court therefore dismissed plaintiffs' claim.

Shortly after the district court rendered its decision this court recognized a narrow exception to the general rule of nonreviewability pending the entry of a final order in *HRC v. Smith*. In that case the question was whether the district court could review the plaintiffs' challenges to such INS practices as setting ten-day limits for the filing of asylum claims and scheduling many hearings on asylum petitions simultaneously.[31] The *HRC*

[31] Deportable aliens, such as the Haitians involved in *HRC v. Smith*, are subject to a different review procedure under § 1105a(a), whereby the circuit courts of appeal are vested with exclusive jurisdiction to review "all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings under section 1252(b) [deportation hearings]. . . ." Although the review procedure is therefore somewhat different for resident aliens, the basic considerations of fairness and judicial economy that concerned the *HRC* court are clearly applicable in the present context as well.

panel concluded that because the complaints raised by the plaintiffs addressed "matters alleged to be part of a pattern and practice by immigration officials" to violate the rights of aliens under the Refugee Act, they constituted wrongs "which are independently cognizable in the district court under its federal question jurisdiction." 676 F.2d at 1033.[32] The court further explained that:

> The distinction we draw is one between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers *when a wholesale, carefully orchestrated, program of constitutional violations is alleged.*

Id. (emphasis added); *see also Cheng Fan Kwok v. INS*, 392 U.S. 206, 210, 88 S.Ct. 1970, 1973, 20 L.Ed.2d 1037 (1968); *Fleurinor v. INS*, 585 F.2d 129, 135-36 & n. 6 (5th Cir. 1978) (noting that although the circuit court lacked jurisdiction under § 1105a(a), "allegations of pro-

[32] To the extent that the jurisdictional arguments of *HRC* may be read as resting on constitutional grounds, the applicable language is disapproved. In this case, plaintiffs' claim could be heard by the district court pursuant to its jurisdiction under 28 U.S.C. § 1331, since petitioners are seeking a determination whether the Refugee Act of 1980 and its accompanying regulations require the INS to notify aliens of their right to apply for political asylum prior to the commencement of exclusion proceedings before an immigration judge. *See, e.g.*, 8 U.S.C. § 1101(a)(42); *id.* § 1158(a); *id.* § 1253(h); 8 C.F.R. § 208.3. Because plaintiffs' complaint raises the issue whether the agency has acted in accord with the statutory mandate of Congress, as well as its own regulations and procedures, the district court can sustain jurisdiction over this claim under the reasoning set forth in section II.C above.

cedural irregularities in the asylum proceeding would be reviewable in the appropriate district court"); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 364 (C.D.Cal. 1982).

The *HRC* panel therefore emphasized the importance of distinguishing between an individual challenge on a preliminary procedural matter, which the finality provisions of § 1105a would govern, and allegations of widespread abuses by immigration officials. In the latter case, postponing conclusive judicial resolution of a disputed issue that affects an entire class of aliens until an individual petitioner has the opportunity to litigate it on habeas corpus would foster the very delay and procedural redundancy that Congress sought to eliminate in passing § 1105a. For this reason, we conclude that § 1105a(b) does not prohibit us from considering plaintiffs' claims that they have a right to notice of the opportunity to seek asylum. We stress that our holding is a narrow one that should not be construed to permit judicial review of run-of-the-mill interlocutory procedural rulings by an immigration judge with which an alien happens to disagree. As the panel stated in *HRC v. Smith*,

> [s]uch a result would indeed defeat the congressional purpose behind the enactment of section [1105a]—the elimination of dilatory tactics by aliens challenging deportation orders in a piecemeal fashion. . . . We do not intend by our holding today to emasculate that solution, and given the narrowness of our holding, we do not expect such a result.

676 F.2d at 1033.

The district court also suggested that review of plaintiffs' claim of a right to notice was barred by their failure to exhaust their administrative remedies as required by § 1105a(c). *Louis II*, 532 F.Supp. at 887-88 & n. 8. As the *HRC* court pointed out, however, "[i]t is tautological that the exhaustion doctrine does not preclude the

exercise of jurisdiction when there are no further administrative remedies to pursue." 676 F.2d at 1035. This is precisely the situation with regard to petitioners' claim on the notice issue. Under the applicable regulations, an alien who wishes to apply for asylum can get two bites at the apple: first, by presenting his claim to the INS district director prior to the commencement of exclusion proceedings against him, 8 C.F.R. § 208.3(a), and second, by filing a request with the immigration judge after the exclusion hearing has begun. *Id.* § 208.3(b). If the alien does not file an application with the district director before the commencement of the exclusion proceedings against him, this first opportunity to seek asylum is simply lost, because the immigration judge and the Board of Immigration Appeals have no authority over, or ability to remand proceedings to, the district director. *HRC v. Smith*, 676 F.2d at 1036 (noting that "the BIA could not grant relief for procedural errors in asylum proceedings before the district director"); *see also* 8 C.F.R. § 3.1(b). The existence of unexhausted administrative remedies—such as a request to withhold deportation under 8 U.S.C. § 1253(h)—applicable to an alien's opportunity to apply for asylum before the immigration judge therefore cannot justify invoking the exhaustion doctrine with respect to a challenge to the procedure before the district director. *See HRC v. Smith*, 676 F.2d at 1035-36. We conclude that neither the finality provision of § 1105a(b) nor the exhaustion requirement of § 1105a(c) bars us from reaching the merits of plaintiffs' claim at this time.

B. *The Merits*

In *HRC v. Smith* this court recognized that the Refugee Act of 1980 and its accompanying regulations created a "right to petition our government for political asylum." 676 F.2d at 1038. Several courts have reasoned that the government must be required to notify aliens who face exclusion or deportation of the opportunity to apply for asylum if this right is to be effectuated. *See, e.g., Jean,*

711 F.2d at 1507-08; *Orantes-Hernandez*, 541 F.Supp. at 361; *Nunez v. Boldin*, 537 F.Supp. 578, 586 (S.D. Tex.), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982). We disagree.

The first point that requires clarification is the nature of the right recognized in *HRC v. Smith*. The Supreme Court has recognized that some state or federal laws can, by creating substantive entitlements to particular government benefits, lead to the constitutional protection of those benefits as "liberty" or "property" interests within the meaning of the Due Process Clause of the fourteenth amendment. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S.Ct. 2963, 2985, 41 L.Ed.2d 935 (1974). However, when dispensation of a statutory benefit is clearly at the discretion of an agency, or when a statute only provides that certain procedural guidelines be followed in arriving at a decision, then there is no creation of a substantive interest protected by the Constitution. *Hewitt v. Helms*, —— U.S. ——, ——, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983); *Bishop v. Wood*, 426 U.S. 341, 345-47, 96 S.Ct. 2074, 2077-78, 48 L.Ed.2d 684 (1976); *Olegario v. United States*, 629 F.2d 204, 223-224 (2d Cir. 1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981).

Under this analysis, it is clear that the Refugee Act does not create an entitlement to asylum. Instead, it states merely that an alien "*may* be granted asylum *in the discretion* of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C. § 1101(a)(42)(A)]." 8 U.S.C. § 1158(a) (emphasis added).[33] Because the Act creates only a right to petition for asylum, it carries with it no guarantee of securing the substantive relief sought. *HRC*

[33] Although 8 U.S.C. § 1253(h) prohibits the Attorney General from deporting an alien if he determines that the alien's life or freedom would be jeopardized by returning him to a particular country, this provision does not create a substantive entitlement to asylum, but simply to relief from deportation to that country.

v. Smith, 676 F.2d at 1038-39 & n. 37. The grant of asylum does not, therefore, create an interest protected by the due process clause.[34]

In the absence of a constitutional right, the only procedures to which plaintiffs are entitled are those granted by the statute or the agency. As we have noted, the agency is required to comply with applicable statutory provisions and its own regulations and policy statements. *See, e.g., Accardi*, 347 U.S. at 267, 74 S.Ct. at 503; *HRC v. Smith*, 676 F.2d at 1041 n. 48; *Olegario*, 629 F.2d at 224. Given the statutory mandate instructing the Attorney General to "establish a procedure for an alien physically present in the United States or at a land border or port of entry . . . to apply for asylum," 8 U.S.C. § 1158(a), the *HRC* panel was clearly correct in finding that the statute and its accompanying regulations reflect Congress' "clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum." 676 F.2d at 1038. The question then becomes whether notice of the opportunity to apply for asylum before the district director is clearly mandated by the terms of the Refugee Act.

We conclude that it is not. The Act plainly contains no express statement of such a requirement. Appellees instead base their claim largely on the following statement in a Senate committee report on the Refugee Act:

> The bill requires the Attorney General to establish a uniform procedure for passing upon an asylum application. The Committee believes such a uniform procedure should include a provision allowing all asylum applicants an opportunity to have their claims considered outside a deportation and/or exclusion proceeding, *provided the order to show cause has not been issued.*

[34] This conclusion affirms what we stated in note 27, *supra*, *i.e.* that we disavow any language used by the *HRC* court that might be read to suggest that excludable aliens have constitutional rights under the fifth amendment with regard to their applications for admission, asylum, or parole within this country.

S.Rep. No. 256, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad.News 141, 149 (emphasis added). Despite appellees' contentions, however, the fact that Congress sought to provide an additional, non-adversarial procedure for hearing asylum requests does not support the conclusion that Congress intended to require notice of the opportunity to petition the district director for asylum. An "order to show cause" is issued by the INS and serves to notify an alien that the deportation process against him has commenced. *See* 8 C.F.R. § 242.1. Congress therefore clearly intended to limit the right to an alternative asylum procedure to the period before the formal deportation or exclusion proceeding has begun. Thus, far from treating the right to petition the district director as a critical part of its asylum scheme, Congress provided that this opportunity should expire within a definite time limit, suggesting that it regarded this procedure as a desirable but by no means essential part of the asylum process. The terms of the applicable regulations are in keeping with this intention, specifying that an alien may file a petition for asylum with the district director when the alien "(1) Is seeking admission to the United States, or; (2) Is in the United States, regardless of his/her status, and has not been placed under exclusion proceedings or served an order to show cause." 8 C.F.R. § 208.3(a).

Because Congress made no direct reference to a notice requirement and the provisions of the applicable regulation appear to accord with the intent that Congress did express, plaintiffs must ultimately fall back on the assertion that a right to notice derives *a fortiori* from the establishment of an asylum procedure. The weakness with this argument is that Congress provides many opportunities to the people of this country without requiring the government to publicize their availability or to take affirmative action to notify possible beneficiaries. It has never been held, for example, that the government must inform individuals that they have the right to sue the

government for tort claims, or the right to seek educational loans or public assistance. In addition, requiring mandatory notice of the opportunity to seek asylum may actually serve to frustrate Congress' intention of preserving aliens with a well-founded fear of persecution in their home countries from repatriation. As one commentator notes:

> [B]lanket notice will also tempt even those without any fear of persecution to latch on to asylum as their last hope. . . .
>
> . . . .
>
> [T]oo many asylum applications may only bury the truth by straining INS resources and preventing careful assessment of individual claims. If the volume of asylum claims rises significantly, the INS may feel compelled to rely more and more on group profiles and less on individual evidence and credibility.

Note, *Protecting Aliens from Persecution Without Overloading the INS: Should Illegal Aliens Receive Notice of the Right to Apply for Asylum?*, 69 Va.L.Rev. 901, 922, 924 (1983).

We therefore conclude that although aliens have a protected statutory and regulatory right to petition for asylum, neither the Constitution nor the Refugee Act and its accompanying regulations require the INS to inform all potential applicants of their right to seek asylum.[35]

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[35] The INS' current policy is apparently to inform arriving aliens of their right to seek asylum only if they have questions during their initial interviews with INS officials that "flag asylum claims such as fear of persecution upon being returned. . . ." *Caribbean Migration: Oversight Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 225 (1980) (statement of David Crosland, Acting Commissioner, INS). Of course, if INS officials were refusing to inform aliens of their right to seek asylum even if they did indicate that they feared persecution if returned to

Although our reasoning differs somewhat from that employed by the court in *HRC v. Smith*, we reaffirm its conclusion that the existence of this protected right to apply for asylum bars government officials from adopting policies that conflict with the terms of the statute, applicable regulations, and their own announced operating procedures.

IV. RIGHT OF ACCESS TO DETAINEES

Petitioners also contend that the government has placed extensive restrictions on contacts between outsiders and the Haitian detainees, thereby frustrating the efforts of Haitian Refugee Center (HRC) attorneys to inform them of their legal rights. Plaintiffs originally challenged these restrictions on a number of grounds, but the district court dismissed all of them prior to trial except a first amendment claim. The latter claim was dismissed by the district court after trial on grounds of mootness, since the court's final order released all the Haitians in detention at that time. Plaintiffs challenge the mootness holding and request a determination on the merits.

Since a substantial number of class members are now being held in detention, either because they arrived in this country after the government promulgated its new regulations under the APA or because their parole was revoked after the district court's decision, it is clear that the first amendment claim is not moot. Because the district court did not decide this issue, however, there is no factual record before us, and we conclude that it would be improper for us to reach a decision on the merits. The Supreme Court has repeatedly emphasized that counsel have a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration, *see, e.g., In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.

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their home countries, our conclusions would be different. This would constitute a clear violation of the Refugee Act, and remedial action would be justified under *HRC v. Smith*.

2d 417 (1978); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963); *NAACP v. State. ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), but this claim presents a number of questions that require the development of a factual record. We note that the restrictions challenged by plaintiffs do not amount to an absolute denial of access, and the rules involved are not of such a nature that we can strike them down as facially impermissible even without an awareness of possible countervailing considerations. Because the regulation of aliens in detention may implicate security concerns similar to those that apply in the prison context, the district court will clearly need to hear evidence on these matters to arrive at the proper balance between the government's interest in security and the HRC's interest in exercising its first amendment rights. We therefore remand this claim to the district court for its consideration in light of the principles set forth above.

V. CONCLUSION

In summary, we conclude that under well-established Supreme Court precedents excludable aliens such as the Haitian plaintiffs have no constitutional rights with respect to their applications for admission, asylum, or parole. The courts do have authority, however, to review the decisions of executive officials in the immigration area to ensure that they have exercised their discretion in accordance with the applicable statutes, regulations, and the announced policies of their agencies. We emphasize that while it is not the role of the courts to substitute their own judgment for that of executive officials, the courts are not powerless to act when government officials have either failed to exercise their discretion or abused it by acting outside the scope of their delegated authority. Thus, although we conclude that high-level executive officials such as the President and the Attorney General have the authority under the INA to draw distinctions between classes of aliens, discrimination on the basis of national

origin by low-level officials in violation of an official executive policy would constitute an abuse of discretion, justifying appropriate remedial action by the courts.

Because we hold that the government's promulgation of regulations under the notice and comment provisions of 5 U.S.C. § 553 to govern the new detention policy has mooted the issue of agency compliance with the APA, we dismiss that part of the appeal and remand with instructions that the injunctive relief grounded on the claimed APA violation be vacated. With regard to those class members currently in detention under the new regulations, the district court should conduct appropriate proceedings to determine whether any relief is necessary in light of the considerations set forth in this opinion. While we reaffirm the holding of the panel in *HRC v. Smith* that the provisions of the Refugee Act of 1980 and its attendant regulations confer a protected statutory and regulatory right to apply for asylum, we conclude that blanket notice of this opportunity to all aliens faced with exclusion or deportation is not mandated by the explicit provisions of the Act, the applicable regulations, or the underlying congressional intent. Finally, we remand to the district court for the development of a factual record the question whether the government's restrictions on access to the Haitian detainees are impermissible under the first amendment.

The complex nature of the questions presented by this case has required detailed consideration, but our ultimate holding is simple and straightforward. Excludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution. They do have rights, however, to whatever process Congress—and through its regulations and established policies, the Executive branch—have extended them. Our holding therefore recognizes that while the courts must give proper deference to the plenary power of the political branches to regulate

the admission of aliens into our country, the foreigner who comes to our shores with hopes of gaining entry does not stand altogether outside the protection of our laws.

DISMISSED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

TJOFLAT, concurring in part and dissenting in part:

I concur in the result of the majority opinion vacating the district court's decision, and in all but part II C of the majority opinion. I dissent regarding the scope of the review we today authorize the district court to take of the Attorney General's parole policy.

The majority would have the district court determine on remand:

> whether the criteria [local immigration officials] employed in making [parole] determinations were consistent with the statutory grant of discretion by Congress, the regulations promulgated by the agencies involved, *and the policies which had been established by the President and the Attorney General.* If the court should find that low-level immigration officials have discriminated on the basis of national origin *despite the adoption of a contrary policy by their superiors in the executive branch*, such conduct would constitute an abuse of discretion that would justify appropriate relief.

Majority opinion at 979 (emphasis added). Insofar as this would require the district court to decide, without consulting the Attorney General himself, how the Attorney General really must have meant to exercise his discretionary parole authority in a particular situation, it casts the district court into an evidentiary quagmire that is not only impractical and unnecessary, but also threatens to destroy the broad discretion Congress granted to the Attorney General in 8 U.S.C. § 1182(d)(5)(A).

We do have the authority to conduct some review of the Attorney General's discretionary decisions regarding parole. *See Mathews v. Diaz*, 426 U.S. 67, 81-2, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). *See also Bertrand v. Sava*, 684 F.2d 204, 210 (2d Cir. 1982); *Palma v. Verdeyen*, 676 F.2d 100, 105 (4th Cir. 1982). However, we undertake a very narrow review of such decisions; the High Court held in *Kleindienst* that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against [other interests]." 408 U.S. at 770, 92 S.Ct. at 2585. In reviewing the Attorney General's decision we might well, for notice reasons, limit his discretionary authority by official policy statements in CFR, but by little else. We respect Congress' broad delegation of power to the Executive in such areas because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government [and as such is] largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952) (footnote omitted), quoted in *Mathews, supra* at 81 n.17, 96 S.Ct. at 1892 n.17.

The Attorney General has discretion in this area in part to enable him to react flexibly to new situations, and his officers in the field are his eyes and ears in his determination of the best way to exercise his discretion. For this reason, instead of asking the district court to interfere in questions of intra-INS communication and discipline, I would assume the Attorney General to adopt the actions of his officers in the field and ask him to justify them in court, according to our "abuse of discretion" standard, if he wishes to do so. If the field officers have strayed from the Attorney General's wishes, the matter

is thus brought to his attention and he can conduct the necessary intra-office discipline. If, as is more likely, the field officers have acted pursuant to policies implicitly, if not expressly, approved by the Attorney General, his decisions will be subject to the requisite narrow judicial review.

The majority implies that the district court will have an easy time in this case determining what the Attorney General's policy on nationality is, without asking him, because a "facially neutral" policy statement on parole exists at 8 CFR 212.5. The policy in CFR is not a comprehensive policy, however. It merely sets out a few specific categories of aliens e.g. pregnant women, those suffering medical emergencies, or certain juveniles, who the district director *generally* should parole in the absence of countervailing security risks. It leaves the weighing necessary to making parole decisions regarding these categories, as well as all other parole decisions, purely in the discretion of the district director. Such a minimal directive is not enough to infer with any certainty that the Attorney General never wants district directors, in making parole decisions, to consider nationality.

In order for the district court to find a "governing policy" on nationality, or specifically on Haitians, it may be necessary for the court to probe extensively into internal office memoranda, oral instructions between supervisors and employees at all levels, and even into intangible intra-office expectancies regarding what is, or what is not, approved conduct. Such an investigation obviously would be impractical in the extreme, and more important, would be totally unnecessary when all this court need do is ask the Attorney General whether he adopts his subordinate's action.

The only issue concerning the court under our narrow standard of review should be whether an action undertaken by the Attorney General, or undertaken by his subordinates and adopted or approved, implicitly or explicitly, by the Attorney General, is outside his broad dis-

cretion under 8 U.S.C. § 1182. To that end, the district court on remand should confine itself to asking the Attorney General to justify in the appropriate manner the actions undertaken by him or his department. Otherwise the district court is thrust between the Attorney General and his employees as an interpreter, telling the field officials, in effect, "Your boss did not really mean for you to do X; rather he wants you to do Y." Such a review would limit the Attorney General's discretion by curtailing his ability to react flexibly to changing situations; the district court would constantly be stepping in and reversing field officers' actions unless a paper trail from the Attorney General's office authorized the action. Congress, in granting the Attorney General discretion in parole matters, certainly never intended such an intrusive review; nor can such review be reconciled with the very narrow review of immigration decisions authorized in prior Supreme Court decisions.

KRAVITCH, Circuit Judge, specially concurring in part and dissenting in part with whom JOHNSON, HATCHETT and CLARK, Circuit Judges, join.

I concur in the result for all but Part III.C of the majority's opinion. I write specially as to Part II.B and dissent as to Part III.C.

That Congressional and Executive authority over immigration matters is broad and far reaching is beyond question. Nor is it disputed that aliens seeking entry into this country can claim few constitutional protections regarding their entry. I write specially, however, because I believe that the majority opinion has unnecessarily and incorrectly eroded those few rights to which the courts have determined excludable aliens are entitled under either Congressional statutes or the Constitution.

I.

I initially question, given the majority's treatment of the issues involved as ones concerning abuse of discretion,

the opinion's extensive discussion of the constitutional rights of excludable aliens. The majority states that because the INS now has adopted facially neutral criteria for parole, "[t]he question that the district court must therefore consider with regard to the remaining Haitian detainees is thus not whether high level executive branch officials such as the Attorney General have the discretionary authority under the Immigration and Nationality Act [INA] to discriminate between classes of aliens, but whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors." *Supra*, at p. 963. Similarly, the majority later notes that "because the government has contended throughout this case that its new detention policy does not discriminate on the basis of national origin, resolution of [whether the executive can discriminate on the basis of national origin] is not essential to our holding . . . ." *Supra*, at p. 978.

It is a basic proposition that "prior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 2199, 68 L.Ed.2d 693 (1981). Here, the majority, in light of the Executive's contention that it was not discriminating and the INS's new facially neutral regulations, has chosen to treat the plaintiffs' claims of discrimination as a non-constitutional contention that low-level INS officials abused their discretion in following the regulations. I do not disagree with the majority that any abuse of discretion questions, as non-constitutional grounds for decision, should have been the first questions addressed. Indeed, the majority is entitled to conclude that the district court and panel erroneously reached the constitutional questions before the non-constitutional ground of abuse of discretion. By choosing that mode of analysis, however, the constitutional powers of Congress or the Executive to discriminate on the basis of national origin in granting

parole or the constitutional rights of excludable aliens are not properly before us, and any such discussion by the majority can only be viewed as dicta in deciding future cases.[1]

II.

I am also unable to agree with the majority's conclusion that "responsible executive officials such as the President or Attorney General possess [the] authority [to discriminate on the basis of national origin] under the INA." *Supra*, at p. 978.[2]

The provisions of 8 U.S.C. § 1182(d)(5) grant the Attorney General the discretion to parole "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." The grant of discretionary power, therefore, is facially neutral on the basis of the statute's language. Likewise, the legislative history of the provision centers on non-discriminatory factors, such as reuniting families and medical reasons. That the statute is facially neutral is further evidenced by other statutes in which Congress has given the Executive the power to discriminate on the basis of national origin. For example, in contrast to the parole statute, which contemplates individual consideration based on non-discriminatory factors, 8 U.S.C. § 1182

[1] The case on which the majority primarily relies, *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982), did not reach the constitutional question of due process. *Id.* at 207 n. 6. The court noted that on the facts presented any discrimination that would arguably violate the Fifth Amendment would also constitute an abuse of discretion. The *Bertrand* court, therefore, properly did not reach the due process issue, as it could decide the issue presented on non-constitutional grounds.

[2] I also question whether the *statutory* power of the Executive to discriminate under 8 U.S.C. § 1182(d)(5) is properly before us, as the majority has refined the issue to abuse of discretion by lower-level officials. Because the abuse of discretion question may involve questions of the Executive's statutory authority, however, I feel it necessary to address the majority's reasoning.

(f) gives the Executive the power to bar entry of "any class of aliens" when "the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental. . . ."[3] Congress thus has shown that it knows how to grant the Executive the authority to discriminate based on national origin where it deems necessary, but no such grant can be found from the language of section 1182(d)(5).

The case that the majority primarily relies upon reaches a similar conclusion as to the nature of the parole statute. The Second Circuit in *Bertrand v. Sava* held:

> Section 1182(d)(5) permits the Attorney General to deny parole to all or to certain groups of unadmitted aliens on the ground that he finds no emergent or public interest reasons justifying their release on parole. The discretion may not be exercised to discriminate invidiously against a particular race or group or to depart without rational explanation from established policies. *See Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715, 719 (2d Cir.1966). Such exercise of the power would not be "legitimate and bona fide" within the meaning of *Kleindienst v. Mandel.*

684 F.2d 204, 212 (2d Cir.1982).[4]

[3] Even the broad powers granted by 8 U.S.C. § 1182(f), however, require that the President find that the entry "be detrimental;" presumably, this finding would have to be legitimate and not merely pretextual.

[4] The majority also relies on *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980), for the proposition that the Executive has the power to discriminate against aliens on the basis of nationality. *Supra* at 978 n. 30. The *Narenji* court qualified that power, however, by noting that "[s]o long as such distinctions *are not wholly irrational* they must be sustained." 617 F.2d at 747 (emphasis added). Likewise, the other cases the majority relies on either required a rational reason for the Executive's action, *Nademi v.*

The parole statute, therefore, grants the Attorney General wide discretion to deny or grant parole, but the exercise of that discretion must be based upon legitimate and bona fide reasons. To conclude, as the majority does, that the Executive may discriminate under the facially neutral parole provisions of the INA contradicts the principle expressly acknowledged by the majority: where Congress has acted in regulating the admission of aliens, the Executive's power is restricted. *See supra*, at pp. 974-975. *See also INS v. Phinpathya*, —— U.S. ——, 104 S.Ct. 584, 593, 78 L.Ed.2d 401 (1984) (Congress designs the immigration laws); *United States v. Frade*, 709 F.2d 1387 (11th Cir.1983) ("power over immigration matters belongs jointly to the legislature and executive branches, and when exercised by the President, should be in conformity with Congressional intent.") Here, Congress has not given the Executive the power to discriminate in parole decisions based solely on nationality.[5]

Requiring the Attorney General to exercise his discretion based on rational reasons is neither overly burdensome nor unduly restrictive of his powers. Legitimate reasons could necessitate blanket detention of all aliens from a certain country in a crisis situation such as a medical epidemic in the country of origin or for national security reasons. Indeed, in my view, the Attorney General could adopt a policy of denying parole to all aliens, choosing to allow release only for medical or other non-

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INS, 679 F.2d 811, 814 (10th Cir. 1982); *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981), or did not reach the question, *Yassini v. Crosland*, 618 F.2d 1356, 1362 & n. 7 (9th Cir. 1980). All these cases also involved the Iranian crisis, thus adding the President's foreign affairs power to the Executive's reasons for acting.

[5] The majority's reading would also, of course, allow the Attorney General to deny parole without justifiable reason on the basis of religion, race, gender or economic class.

discriminatory reasons.[6] My objection to the majority's reading of the INA is the conclusion that the Attorney General may invidiously discriminate in the granting of parole merely because the Executive decides, without rational reason, that aliens from a certain country should be denied temporary parole.[7]

Nor does such a view create the possibility that the United States would "lose control over our borders." *Supra*, at 975. The scenario that the majority describes of a foreign leader sending over citizens of his country and "compel[ling] us to grant physical admission via parole . . . ," *supra*, at 975, is both irrelevant to the holding and unnecessarily alarmist.

First, here we are concerned only with the discriminatory denial of temporary parole prior to deportation or exclusion proceedings; hence, the constitutionality of "indefinite detention" is not properly before us. Second, to the extent pre-deportation parole is relevant, such a de facto invasion envisioned by the majority would present a rational basis for the Attorney General to deny temporary parole. Third, the President has the capability of preventing any such crisis under 8 U.S.C. § 1182(f) (cited by the majority as an example of the Executive's broad powers) and § 1185(a), which gives the President broad powers to act during a national emergency or time of war; moreover, such an "attack" on our borders would likely fall under the Executive's foreign affairs power. Finally, the majority's prime concern—ensuring that excludable aliens could be detained indefinitely *without a justifiable reason*[8]—would extend the holdings of those

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[6] The district court found that this policy is in essence that of the present administration. *Louis v. Nelson*, 544 F.Supp. 973, 980-81 (S.D. Fla. 1982).

[7] Because we are dealing with a question of statutory interpretation, I decline to address the equal protection or due process issues that would be raised if the Attorney General adopted new regulations discriminating on the basis of nationality.

[8] If the aliens in question posed a risk to society or national security, or created other problems necessitating detention, such

cases cited by the majority beyond their intended scope and meaning.[9]

III.

I also disagree with the majority's conclusion that excludable aliens do not have a constitutional right to be notified of their protected right to apply for asylum.

The predecessor of this court in *HRC v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982),[10] held that it was Congress' "clear intent to grant aliens *the right to submit and the opportunity to substantiate* their claims for asylum." *Id.* at 1038 (emphasis added). The *Smith* court found that although aliens do not have a substantive en-

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dangers would of course provide a rational reason for the Executive to continue detention. Because the majority's scenario poses a situation where no legitimate reason for further detention exists, we must assume that they are concerned with the Executive's power to detain excludable aliens who could not otherwise be detained except for their status as excludable aliens.

[9] It is worth noting that in *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953), the alien involved posed a security risk; a factor which the Supreme Court not only found to be important, but also a distinguishing factor from normal parole proceedings:

> It is true that resident aliens temporarily detained pending expeditious consummation of deportation proceedings may be released on bond by the Attorney General whose discretion is subject to judicial review. *Carlson v. Landen*, 1952, 342 U.S. 524 [72 S.Ct. 525, 96 L.Ed. 547]. By that procedure aliens uprooted from our midst may rejoin the community until the government effects their leave. *An exclusion proceeding grounded on danger to the national security, however, presents different considerations;* neither the rationale nor the statutory authority for such release exists.

345 U.S. at 215-16, 73 S.Ct. at 630-31 (emphasis added).

As the majority notes, there are also other factual differences that distinguish *Mezei* from the questions presented here. *See supra* at 965 n. 6.

[10] This circuit has adopted as binding precedent all decisions of former Fifth Circuit Unit B. *Stein v. Reynolds Securities Inc.*, 667 F.2d 33 (11th Cir. 1981).

titlement to asylum, the Refugee Act of 1980 does create "at a minimum a constitutionally protected right to petition our government for political asylum." *Id.* The majority's opinion does not disavow these basic holdings in *Smith*. *Supra*, at 981-983, 983.

The question then becomes whether "the right to submit and the opportunity to substantiate" a claim for asylum includes the right of an alien to be notified that he has such a right in the first place. The majority concludes that no right to notice exists because it is not expressly mentioned in the pertinent statutes or regulations and because no right to notice has been found for other congressionally created opportunities, such as the availability of educational loans and public assistance. *Supra*, at 984-985.

I find such reasoning unpersuasive because it ignores the reality of the situation before us and frustrates Congress' intent in passing the Refugee Act of 1980. The Refugee Act was enacted to give "statutory meaning to our national commitment to human rights and humanitarian concerns." S.Rep. No. 96-256, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S.Cong. & Adm.News 141. Those aliens to which Congress intended the Act to apply will frequently arrive on our shores ignorant of our legal system and unschooled in our language. If the Act truly is to have "meaning," and the constitutionally protected right to petition for asylum recognized by the *Smith* court is to have any substance, these individuals must be informed that the procedures and rights provided by the Act are available to them. To hold otherwise is to effectively negate Congress' effort to provide aliens a meaningful opportunity to present legitimate claims for asylum.[11]

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[11] The majority suggests that if all aliens were given notice, the danger exists that legitimate claims would be overshadowed by frivolous claims. *Supra* at 984. Certainly, if aliens are not notified of their right to petition for asylum there will be fewer claims, as the aliens will not be aware that such a right exists. The problem

Because notice is an inseparable part of the constitutionally protected right to petition for asylum under the Refugee Act, and because notice would effectuate Congress' intent, I would hold that the due process protections accorded by the *Smith* court encompass the right to notice.

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with the majority's solution for weeding out frivolous claims is that it also leads to the loss of the right to petition by aliens with legitimate claims, thus effectively emasculating the very rights that Congress intended to create.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5772

MARIE LUCIE JEAN, ET AL., PLAINTIFFS

LUCIEN LOUIS, ET AL.,
PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

STATE OF FLORIDA, INTERVENOR-APPELLANT

versus

ALAN C. NELSON, ET AL.,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

Appeal from the United States District Court
for the Southern District of Florida

[May 4, 1984]

ON PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5772

D.C. Docket No. 81-01260-CIV-EPS

MARIE LUCIE JEAN, ET AL., PLAINTIFFS

LUCIEN LOUIS, ET AL.,
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STATE OF FLORIDA, INTERVENOR-APPELLANT

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for the Southern District of Florida

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be, and the same is

hereby, DISMISSED IN PART, REVERSED IN PART and REMANDED WITH INSTRUCTIONS;

It is further ordered that each party bear their own costs on appeal.

Entered: February 28, 1984

For the Court: Spencer D. Mercer, Clerk

By: /s/ Anne A. Godfrey
Deputy Clerk

Issued as Mandate: May 4, 1984

SUPREME COURT OF THE UNITED STATES

No. 84-5240

MARIE LUCIE JEAN, ET AL., PETITIONERS

v.

ALAN NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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[ORDER GRANTING CERTIORARI AND IN FORMA PAUPERIS]

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 3, 1984

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PETITIONER'S

BRIEF

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No. 84-5240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL.,

Petitioners,

v.

ALAN C. NELSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR PETITIONERS

Counsel:
BRUCE J. WINICK, ESQ.
IRWIN P. STOTZKY, ESQ.
CHRISTOPHER KEITH HALL, ESQ.
MICHAEL J. ROSEN, ESQ.
Of Counsel:
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
By: ROBERT E. JUCEAM, ESQ.
TERRENCE A. CORRIGAN, ESQ.
Attorneys for Petitioners

Counsel of Record:
IRA J. KURZBAN, ESQ.
KURZBAN, KURZBAN & WEINGER, P.A.
Suite 901
700 Brickell Avenue
Miami, Florida 33131
(305) 371-0268

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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QUESTIONS PRESENTED[1]

Is invidious discrimination on the basis of race and nationality by immigration enforcement officials, acting pursuant to neutral statutes and directives, in the incarceration of excludable black Haitian refugees in detention camps, wholly beyond constitutional scrutiny?

Whatever judicial deference may be accorded the actions of Congress and the President in exercising their authority to admit or exclude aliens, does such deference wholly preclude constitutional review of the established invidiously discriminatory conduct of low-level government officials in regard to non-admission questions?

Does *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), have continuing validity, and should it be extended to permit invidious discrimination based on race and national origin by Immigration and Naturalization Service enforcement officials in the incarceration of aliens pending a determination of their asylum claims?

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[1] The parties to the proceedings are listed below. The petitioners are: Marie Lucie Jean, Lucien Louis, Herold Jacques, Jean Louis Servebien, Pierre Silien, Wilner Luberisse, Job Dessin, Joel Casmir, Serge Verdieu, Milfort Vilgard, and the heirs of Prophete Talleyrand, on behalf of themselves and all others similarly situated. Mr. Talleyrand committed suicide during the pendency of this suit while being held in detention by the Immigration and Naturalization Service.

The respondents are: Alan C. Nelson, Commissioner, Immigration and Naturalization Service; Perry Rivkind, District Director, Immigration and Naturalization Service, District VI; Leonard Rowland, Assistant District Director for Deportation, Immigration and Naturalization Service, District VI; Franklin Graves, Immigration and Naturalization Service, Officer in Charge, Krome Avenue North Detention Facility; The Immigration and Naturalization Service; and William French Smith, Attorney General of the United States.

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OPINIONS BELOW

On December 3, 1984, this Court granted certiorari and petitioners' motion to proceed *in forma pauperis*. *Jean* v. *Nelson*, 105 S.Ct. 563 (1984) (J.A. 358).

On May 4, 1984, the United States Court of Appeals for the Eleventh Circuit denied petitioners' request for a rehearing of its *en banc* decision, *Jean* v. *Nelson*, 733 F.2d 908 (11th Cir. 1984) (J.A. 355)[1] and entered its final judgment on rehearing *en banc*, which is not reported. (J.A. 356). The *en banc* court's opinion is reported. *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) ("Jean II") (J.A. 292). The panel opinion is reported. *Jean* v. *Nelson*, 711 F.2d 1455 (11th Cir. 1983) ("Jean I") (J.A. 193). The decision of the court of appeals denying the government's request for a stay is also reported. *Jean* v. *Nelson*, 683 F.2d 1311 (11th Cir. 1982) (J.A. 191).

The district court's final judgment is reported, *Louis* v. *Nelson*, 544 F. Supp. 1004 (S.D. Fla. 1982) ("Louis IV") (J.A. 175), as is its opinion. *Louis* v. *Nelson*, 544 F.Supp. 973 (S.D. Fla. 1982) ("Louis III") (J.A. 112). Other earlier opinions of the district court are also reported, including its decision dismissing several claims before trial on jurisdictional grounds, *Louis* v. *Meissner*, 532 F. Supp. 881 (S.D. Fla. 1982) ("Louis II") (J.A. 78), its decision enjoining exclusion hearings against unrepresented incarcerated class members, *Louis* v. *Meissner*, 530 F.Supp. 924 (S.D. Fla. 1981) ("Louis I") (J.A. 58), and its decision permitting petitioners' amended petition and complaint. *Jean* v. *Meissner*, 90 F.R.D. 658 (S.D. Fla. 1981).

JURISDICTIONAL STATEMENT

This case seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit *en banc* entered on February 28, 1984. (J.A. 292). On May 4, 1984, that court

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[1] "J.A." refers to the Joint Appendix to the briefs on the merits in this case.

denied petitioners' request for rehearing *en banc* (J.A. 355), and entered its judgment. (J.A. 356). Petitioners filed a timely petition for certiorari on August 1, 1984. The petition was granted by this Court on December 3, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims are based on the equal protection guarantee of the due process clause of the fifth amendment to the United States Constitution, and 8 U.S.C. § 1182(d)(5)(A) (1982). These provisions are set forth below:

U.S. Const., amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1182(d)(5)(A) (1982):

> The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

STATEMENT OF THE CASE

This case challenges the Eleventh Circuit's unprecedented holding that invidious race and national origin discrimination in the incarceration of black Haitian refugees by low-level immigration enforcement officials is wholly immune from constitutional scrutiny. Petitioners do not challenge the authority of the Congress, the President, the Attorney General, or even of the Immigration and Naturalization Service ("INS") to admit or exclude aliens. They do not challenge the proposition that the Constitution limits neither the grounds on which an alien seeking initial admission may be excluded, nor the procedures employed in making that determination. Indeed, petitioners do not even challenge the authority of INS to maintain a policy of detaining excludable aliens on a non-discriminatory basis. Petitioners challenge only the authority of INS enforcement officials to discriminate invidiously in decisions concerning the incarceration of excludable aliens pending a determination of their claims to asylum. As the record in this case demonstrates, without contradiction, INS officials have discriminated invidiously against black Haitian refugees in deciding to incarcerate them initially, and in prolonging their incarceration without parole pending a determination of their asylum claims.

Notwithstanding what a panel of the Eleventh Circuit found to be overwhelming and unrebutted evidence establishing a stark pattern of invidious discrimination,[2] the *en banc* court held that excludable aliens such as Haitian petitioners may not assert the equal protection component of the fifth amendment

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[2] The *en banc* court, without questioning or disturbing, *Jean II* (J.A. 295), the detailed factual findings of invidious discrimination made by a panel of the Eleventh Circuit, *Jean I* (J.A. 246-276, 290), proceeded to decide the constitutional question: "whether the Haitian plaintiffs may invoke the equal protection guarantee of the fifth amendment's due process clause as a basis for challenging the government's refusal to grant them parole." *Jean II* (J.A. 296). It, therefore, implicitly concurred in the panel's factual findings that the evidence established intentional discrimination.

against such practices. This holding—that excludable aliens are outside the protection of the Constitution—is not only unprecedented, but it is at war with our nation's history, values, and constitutional traditions.[3] Moreover, no circumstance of this case—not the race or nationality of petitioners, not their status as excludable aliens, and not the government's interests—could possibly justify the *en banc* court's decision.

1. The Petitioners And The Applicable Statutory, Regulatory And Treaty Provisions

Petitioners, approximately 2,000 black Haitian asylum seekers,[4] are part of the first substantial flight of black refugees who have come to our shores seeking political asylum. They made "a long and perilous journey" over eight hundred miles of open sea, *Louis I* (J.A. 61), to escape the harsh political

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[3] Not since the Dred Scott decision, *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), has this or any other court ever held that a class of persons is wholly immune from constitutional protection. Nor has any court, except for the *en banc* Eleventh Circuit's opinion, ever held that invidiously discriminatory incarceration is immune from all constitutional review.

[4] The district court certified the class as:

> All Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently held in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are unrepresented by counsel.

Louis I (J.A. 69). The class was later amended in the Final Judgment to include all Haitians in detention for whom a G-28 (counsel's notice of appearance form) had been filed. *Louis IV* (J.A. 176). Although the district court released many class members from detention, a substantial number of class members still are being held in detention. *Jean II* (J.A. 296).

conditions in Haiti. Our government,[5] including our courts[6] as well as international organizations and other observers,[7] have repeatedly recognized the repressive political conditions from which these Haitians fled. Upon their arrival in the United States, many of the petitioners sought asylum and requested they not be sent back to Haiti because they feared persecution or death.[8]

Under our law, any alien, regardless of race or nationality, has a statutory, regulatory and treaty right to seek asylum if he has a well founded fear of persecution, 8 U.S.C. § 1158, 8 C.F.R. §§ 208 *et seq.*, 236.3, or if his life or freedom would be threatened if returned to his country of origin. 8 U.S.C. § 1253(h), 8 C.F.R. § 208.3, § 242.17(c), United Nations Protocol Relating to the Status of Refugees, *done* January 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (*entered into force with*

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[5] Record ("R.") at Vol. 51, pp. 2568-2570 (testimony of Steven Cohen, Deputy Assistant Secretary of State, Bureau of Human Rights and Humanitarian Affairs between 1977-1980, that the United States Embassy in Haiti and other U.S. government departments that had studied the issue had concluded that "Haiti was highly repressive and there is virtually no or little political freedom in Haiti.").

[6] *Haitian Refugee Center* v. *Civiletti*, 503 F.Supp. 442, 450 (S.D. Fla. 1980) ("Haitians have flocked to the shores of South Florida fleeing the most repressive government in the Americas"), *aff'd as modified sub nom. Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982).

[7] Petitioners' Exhibit ("Px.") 129 (R. at Vol. 52, pp. 2774, 2775, 2781), Px. 164 (R. at Vol. 52, pp. 2773, 2775, 2781), Px. 165 (*id.*), 168-174, 177 (R. at Vol. 52, pp. 2796-98; Vol. 53, p. 2863), Px. 184 (R. at Vol. 52, pp. 2773, 2775, 2781); R. at Vol. 52, pp. 2769-2799 (testimony of Patricia Rengel, Director of the Washington Office of Amnesty International); R. at Vol. 51, pp. 2654-2748 (testimony of Michael Hooper, Director of the Haitian Project of the Lawyers Committee for International Human Rights).

[8] *See, e.g.*, R. at Vol. 46, pp. 1720-1721 (testimony of Pierre Silien); R. at Vol. 46, p. 1734 (testimony of Henrick Desulme).

respect to the United States, Nov. 1, 1968), Art. 33. Excludable aliens, such as the Haitian petitioners, are accorded these rights whether they arrive at our shores by boat or by other means. 8 C.F.R. § 208.1. The process for determining asylum claims is complex and often takes many months,[9] in sharp contrast to the relatively immediate determinations that are made by the thousands daily in non-asylum exclusion cases.

Although Congress permitted the Attorney General to incarcerate aliens on a non-discriminatory basis during the determination of an alien's claim, 8 U.S.C. § 1225(b), the statute does not require incarceration and was not read to require incarceration by INS officials from 1954 until this case. *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958); *Louis III* (J.A. 150-53); R. at Vol. 38, pp. 123-130, 151, 211-217; Vol. 40, p. 611; Vol. 45, p. 1613. Indeed, Congress specifically provided that excludable aliens, such as petitioners, could be paroled[10] pending a determination of their admissibility. 8 U.S.C. § 1182(d)(5). Prior to the events of this case, excludable aliens seeking asylum pending determinations of their claims were routinely paroled under this statute, regardless of race or nationality. R. at Vol. 38, pp. 173-175; Vol. 40, p. 606; Vol. 41, p. 819. This case arose precisely because INS officials denied parole to black Haitian asylum seekers based on their race and nationality, in contrast to all other excludable aliens, including similarly situated asylum seekers entering Florida from Cuba and Nicaragua. In short, INS applied Congress' intent to permit temporary release pending a determination of admissibility, as expressed in 8 U.S.C. § 1182(d)(5)(A), to all except black Haitian refugees.

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[9] R. at Vol. 38, pp. 186-87 (testimony of Charles Gordon).

[10] The word "parole" has two entirely separate meanings in immigration law. Only temporary parole is involved here. The parole involved is not parole *into* the country in the sense of admission, but rather temporary release from physical custody pending a determination of asylum or final excludability.

2. The Genesis Of The Case

This case began in response to the actions of INS officials during the week of June 1-5, 1981, in holding mass exclusion "hearings" for Haitian refugees seeking asylum in the United States. The respondents held these hearings behind locked courtroom doors and intentionally barred *pro bono* counsel who sought access to the Haitians. INS officers deliberately routed Haitians being brought to the INS courtroom from the detention center through back stairwells and immigration offices at a double-time pace, to avoid lawyers known to be waiting in public areas of the courthouse offering to provide them with free legal assistance. The subsequent hearings, held without lawyers, and marred by inaccurate and misleading translations, prevented the Haitians from understanding the proceedings or being informed of their rights. *Jean I* (J.A. 195); *Louis I* (J.A. 60-62); R. at Vol. 45, pp. 1596-98.

On June 10, 1981, petitioners—a class of black Haitian refugees seeking asylum—filed an emergency habeas corpus petition challenging the procedural fairness of these hearings and the discriminatory treatment applied only to Haitians. After a hearing that documented the procedural irregularities and the inaccurate, misleading translations of the mass hearings, the government confessed error, but not before respondents improperly deported eleven Haitians. *Jean I* (J.A.195).[11]

3. The Announced, Facially Neutral Detention Policy

At approximately the same time that these unlawful actions took place, the Administration established a new policy of detention for excludable aliens.[12] In discussing this policy, high

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[11] The government admitted that these procedures "were faulty and not in compliance with law." *Jean I* (J.A. 195).

[12] It did so without complying with the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982) ("APA"), as the district court and Eleventh Circuit panel found. *Jean I* (J.A.

ranking members of the Executive branch spoke with a single voice: they publicly proclaimed that the policy of detention should be applied evenhandedly to all aliens seeking asylum.

In describing this new policy to the Congress, the Attorney General called for an "evenhanded" rule of detention. *Jean I* (J.A. 212). At the same time, the President confirmed that administrative action was to be "consistent with fair procedures and our constitution," and "consistent with our values of individual privacy and freedom." Statement of the President, *United States Immigration and Refugee Policy*, July 30, 1981 at 829, *cited in Jean I* (J.A. 208-09). The Associate Attorney General and third-ranking official at the Department of Justice, bearing primary responsibility for immigration, testified at trial that if the detention policy was being applied in a discriminatory manner, that was contrary to the intent of the Attorney General, and that any official doing so should be reprimanded or dismissed. *Jean I* (J.A. 217); R. at Vol. 49, p. 2343. Furthermore, congressional policy strongly condemned invidious discrimination by the INS on the basis of race and nationality in all immigration matters.[13] Although Congress

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219-37); *Louis III* (J.A. 220-37). This abruptly changed a long-standing policy, in effect since 1954, of releasing all aliens pending a determination of their admissibility unless the alien was likely to abscond or posed a threat to national security. *Jean I* (J.A. 207-08); *Leng May Ma* v. *Barber*, 357 U.S. at 190.

[13] In 1965, Congress abolished the national origin quota system and special immigration restrictions relating to Orientals, and forbade discrimination based on race, sex, nationality, place of birth or place of residence in all immigration matters. Act of October 3, 1965, P.L. 89-236, 76 Stat. 911, 8 U.S.C. § 1152(a) (1982). Indeed, members of Congress compared this legislation to the Civil Rights Act. *See, e.g.*, 111 Cong. Rec. S24781 (Sept. 22, 1965) ("Last year the Congress took a great step toward the elimination of racial discrimination against American citizens here at home. . . . This immigration reform bill is no less a civil rights measure. It will end four decades of intolerance toward those who seek shelter on our shores, and who, until they

gave the President authority to impose restrictions on the entry of any class of aliens found detrimental to the United States, 8 U.S.C. § 1182(f),[14] this grant of authority was conditioned on his issuance of a proclamation. Here, however, the

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have actually sought entrance, have looked upon our nation as a refuge and a haven from intolerance.") (remarks of Sen. Tydings); 111 Cong. Rec. H21765 (Aug. 25, 1965) ("I would consider the amendments to the Immigration and Nationality Act to be as important as the landmark legislation of this Congress relating to the Civil Rights Act. The central purpose . . . [of the bill] is to once again undo discrimination. . . .") (remarks of Rep. Sweeney). The legislative history is replete with denunciations of race and nationality as criteria in the administration of our immigration laws. *See, e.g.*, 111 Cong. Rec. S24482-83 (Sept. 20, 1965) ("It will eliminate from the statute books a form of discrimination totally alien to the Constitution. Distinctions based on race or national origin assume what our law, our traditions and our common sense deny: that the worth of men can be judged on a group basis.") (remarks of Sen. Kennedy); *id.* at S24446 (Sept. 20, 1965) ("Elimination of racial barriers against citizens of other lands is a logical extension of eliminating discrimination against American citizens.") (remarks of Sen. Fong).

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, *done* January 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (*entered into force with respect to the United States* Nov. 1, 1968), provisions of which specifically prohibit discrimination against refugees on the grounds of race or national origin. For example, Article 3 of the Protocol specifically provides: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." The provisions include a prohibition against refoulment (Art. 33), restriction of movement (Art. 31(2)), and against penalizing an alien for his method of entry (Art. 31(1)). The accession by Congress to the Protocol shows Congress' commitment to a non-discriminatory policy in dealing with asylum seekers such as the Haitian petitioners.

[14] 8 U.S.C. § 1182(f) states:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and

President neither issued any such proclamation nor made any finding as to the petitioners or any other racial or nationality group. Despite the Attorney General's publicly expressed intention, the President's statement, and congressional policy providing for facial neutrality and nondiscriminatory application of parole under 8 U.S.C. § 1182(d)(5)(A)(1982),[15] INS enforcement officials applied this facially neutral policy discriminatorily against the Haitians, resulting in their prolonged incarceration.[16]

4. The Detention Policy Applied To Haitians: Proof Of Discrimination Under *Arlington Heights*

The record reveals an overwhelming and unrebutted stark pattern of discrimination against Haitian refugees sufficient to meet the most exacting requirements for proving intentional discrimination. *Jean I* (J.A. 246-76, 290). *See Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976). Petitioners proved that INS enforcement officials intentionally discriminated against black Haitian nationals in initially incarcerating them, and in keeping them in prolonged incarceration pending a determination of their claims to political asylum. *Jean I* (J.A. 276). Petitioners proved intentional discrimination both directly and indirectly through witnesses,

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for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

[15] The legislative history of 8 U.S.C. § 1182(d)(5)(A) centers on non-discriminatory factors such as reuniting families and releasing detainees for medical reasons. *Jean II* (J.A. 348) (Kravitz, J., concurring and dissenting).

[16] Unlike excludable aliens of other nationalities who were not incarcerated or, in a small percentage of cases, were incarcerated only briefly (usually less than 72 hours), Haitians were incarcerated for prolonged periods of time. Indeed, in most cases, the incarceration of Haitians lasted up to one year. *Jean I* (J.A. 195).

documents, and expert statistical analysis of data provided by respondents. *Jean I* (J.A. 274).

a. Statistical And Non-Quantitative Evidence Of A Disproportionate Impact

At trial, petitioners introduced a wealth of statistical evidence which confirmed the vastly disproportionate impact of the INS detention policy on Haitian aliens as compared with other similarly situated excludable aliens seeking asylum, such as Cubans and Nicaraguans. Petitioners' statistical expert, Dr. Gitlow, examined several sets of data, all of which were supplied by the government. One set of data contained secondary inspection logs at the Miami airport between August 1, 1981 and April, 1982. Px. 186 (R. at Vol. 53, p. 2873; R. at 2986), Px. 187 (R. at Vol. 53, pp. 2875, 2885; R. at 2986), Px. 188 (R. at Vol. 53, pp. 2876-2920; R. at 2986). Dr. Gitlow analyzed three separate compilations of this data to ensure accuracy. He found in each of these compilations that the probability of so many more Haitians than non-Haitians being detained, or so many fewer Haitians paroled, was "on the order of less than two in ten billion times." *Jean I* (J.A. 248); R. at Vol. 53, p. 2948. In some cases, it was "far less than one in ten billion," *Jean I* (J.A. 248); R. at Vol. 53 p. 2949, and equalled approximately 17.6 standard deviations. *Id.* at 2951.

The second set of data reflected persons placed in exclusion or in an exclusion catagory who sought entry into the United States between August 1, 1981 and November 1, 1981. The data was coded by nationality, documentation, attempted entry, date of parole, length of detention, whether an asylum claim was filed, family ties, and comments. Px. 189 (R. at Vol. 53, p. 2906), Px. 190 (*id.* pp. 2907-2920; R. at 2986), Px. 191 (R. at Vol. 53, p. 2951; R. at 2986); *Jean I* (J.A. 248-49). Dr. Gitlow performed binomial analysis on a number of compilations of this data. He evaluated both detention versus parole and length of detention. With regard to each data set, Dr. Gitlow concluded that the chance that the disparate impact of the INS detention policy on Haitians could have occurred at random

was "astronomically remote," R. at Vol. 53, p. 2955, and that the relationship between being Haitian and being detained was "statistically significant." *Jean I* (J.A. 249). Indeed, for some of the data sets, Dr. Gitlow declined to calculate the standard deviation because "it would be so large that my calculator would not hold the numbers." *Jean I* (J.A. 249); R. at Vol. 53, pp. 2964-2965. Dr. Gitlow also performed multivariate, or Chi-squared, analysis of this data to take account of the possible impact of documentation status and other variables, and concluded that the relationship between being Haitian and being detained remained statistically significant, after eliminating the effects of these variables. *Jean I* (J.A. 249-50).

The third set of data, Px. 188 (R. at Vol. 53, pp. 2876-2920; R. at 2986), Px. 193-196 (R. at Vol. 53, pp. 3016-18, 3029-30, 3033; R. at 2986), taken from the government's computer system at the Krome detention camp, covered detention and parole between January and April 1982. This data revealed that the relationship between being Haitian and being detained was highly statistically significant, *Jean I* (J.A. 250), with standard deviations ranging from 7.64 to over 15. R. at Vol. 53, p. 3037. Dr. Gitlow also analyzed data introduced by the government and reached equally, if not more damaging, conclusions from this evidence. *Jean I* (J.A. 250).

Petitioners' statistical evidence showed such a disparate impact on Haitians that, by itself, it demonstrated a pattern of discrimination "as stark as that in *Gomillion* . . . or *Yick Wo*." *Jean I* (J.A. 250-51) *quoting Arlington Heights*, 429 U.S. at 266. In sum, the Administration's new detention policy, intended to be neutral in coverage, was applied by INS enforcement officials to Haitians in a manner so disparate that expert statistical testimony described the chances that the disparity could have occurred at random as "a statistical joke." *Jean I* (J.A. 249).[17]

[17] Indeed, even the district court found that it was "undisputed" that the new detention policy had a disproportionate impact on the petitioners. *Louis III* (J.A. 165).

Furthermore, testimony of witnesses and the government's own documents[18] dramatically revealed that INS officials discriminatorily targeted Haitians for incarceration, *Jean I* (J.A. 251-59), while releasing other excludable aliens similarly situated. The most dramatic comparison was presented by the treatment accorded Nicaraguan applicants. Robert Boyer, an immigration attorney specializing in Nicaraguan asylum matters (R. at Vol. 39, pp. 400-401), testified at length concerning the treatment received by Nicaraguans who sought political asylum in the United States and whose admissibility was challenged. *Id.* at 400-450 *et seq*. In contrast to the treatment of the Haitians, Boyer testified that very few, if any, Nicaraguans had been placed in exclusion proceedings before they had the opportunity to seek political asylum before the District Director. *Id.* at 405. Boyer testified that his Nicaraguan clients in exclusion proceedings had been regularly released from incarceration (*id.* at 418-419), and that other than one isolated case of a Nicaraguan convicted of a cocaine charge, none of his many Nicaraguan clients whose admissibility had been challenged was subjected to prolonged incarceration. *Id.* at 420.[19]

Similarly, Frank Murray, an attorney who at the time of his testimony had practiced immigration law in South Florida for thirteen years, testified that his non-Haitian clients whose admissibility was challenged at the airport were paroled into the United States for their deferred inspection and were continued on parole following the service of an order to show cause why the alien should not be excluded, form I-122. R. at Vol. 42,

[18] See footnotes 23 and 24, *infra*.

[19] This non-detention policy included individuals assisted by the Nicaraguan Refugee Organization (R. at Vol. 39, p. 420), which Boyer represented (*id.* at 401) and which had assisted 12,000 to 13,000 Nicaraguans since 1979. *Id.* at 403. Further, he testified that the Nicaraguans, once questioned as to admissibility, were regularly released. These included both documented and undocumented Nicaraguans who arrived either by boat or at the airport. *Id.* at 449-450.

pp. 970-973. In contrast, Haitians were served with I-122s shortly after their arrival (*id.* at 973-974), and were held in detention pending a hearing. *Id.* at 974.

Finally, incarcerated Haitians provided poignant personal testimony to the fact of discriminatory incarceration of Haitians as compared to other groups of similarly situated aliens, such as Cubans, Colombians, and Mexicans. R. at Vol. 42, pp. 963-964; Vol. 43, pp. 1205, 1259; Vol. 46, p. 1690. Respondents did not rebut, or even attempt to rebut, this testimony. *Jean I* (J.A. 259).

b. Historical Background Of Discrimination

The discriminatory application of prolonged incarceration to Haitians occurred in the context of a lengthy historical pattern of discrimination by INS officials against black Haitian refugees. *Jean I* (J.A. 254). Numerous witnesses,[20] including "former high-ranking INS and Department of Justice officials attested to the persistent targeting and mistreatment of Hai-

[20] Virtually from their initial landing on our nation's shores, Haitians have been treated differently and far worse than all other persons seeking asylum. Many witnesses and documents provided unrebutted evidence of this discrimination. Ira Gollobin, a well known immigration lawyer and counsel to the National Council of Churches, testified to the persistent discriminatory treatment of Haitians over ten years. *Jean I* (J.A. 254-55) R. at Vol. 40, p. 645 *et seq.* Indeed, the discriminatory conduct toward Haitians by INS officials has even been explicitly conceded by government officials. In May 1979, the Deputy Associate Attorney General, in a memorandum to the General Counsel of INS, stated that "we should strive to end the double standard that now seems to prevail between the handling of these Haitian claims and those made by others." *Jean I* (J.A. 252); Px. 109a (R. at Vol. 40, pp. 656-657).

The discriminatory treatment of Haitians was also testified to by Charles Gordon, a former General Counsel of the INS and the leading authority on immigration law of the United States. Mr. Gordon stated that he "never heard of a policy to single out any other

tian[s]." *Jean I* (J.A. 252). The "unrebutted and unexplained testimony" showed "a historical pattern of discrimination under *Arlington Heights*." *Jean I* (J.A. 253-54).[21]

particular group other than Haitians," R. at Vol. 38, p. 140, and that he never heard of simultaneous scheduling of lawyers for any group other than Haitians. *Id.* at 157-158; *Jean I* (J.A. 252).

Other knowledgeable witnesses testified to the disparate treatment of black Haitian refugees as compared to Cubans, Nicaraguans and other groups seeking asylum between 1972 and 1980 in regard to refugee status, release, work authorization, length of incarceration and treatment in incarceration. *See* testimony of Monsignor Brian Walsh, a well-known expert on refugee matters, *Jean I* (J.A. 252); R. at Vol. 38, pp. 260-264; Larry Mahoney, the Public Affairs Officer for the Department of State in the Cuban/Haitian Task Force from July 1980 to May 1981, *Jean I* (J.A. 253); R. at Vol. 43, pp. 1140-43, 1148-50; Jacqueline Rowe, an Equal Opportunity Officer for the Community Action Agency of Metro-Dade County, *Jean I* (J.A. 253); R. at Vol. 44, pp. 1355-72, 1385 *et seq.* In addition, the Mayor of Miami, Maurice Ferre, stated that in his experience as a government official he was aware there had been "indeed a differential in the way Cubans were being treated and the Haitians." *Jean I* (J.A. 252); R. at Vol. 41, p. 787.

[21] The present case is only the latest in a series of cases brought by Haitians to challenge the disparate treatment of Haitian asylum seekers as compared to other groups of refugees. All of these cases demonstrate that Haitians historically have been the victims of lawless conduct by INS enforcement officials.

For over a decade, INS enforcement officials have systematically denied Haitian refugees seeking asylum in this country their right to the fair and impartial administration of our immigration laws. They have unlawfully denied Haitians their statutory and treaty rights to a hearing before an immigration judge in exclusion proceedings on their claims for political asylum. *Sannon* v. *United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated and remanded on other grounds*, 566 F.2d 104 (5th Cir. 1978). They have unlawfully denied Haitians their right to notice of the procedures that the government intended to use against them in exclusion proceedings. *Sannon* v.

c. Other Factors Under *Arlington Heights*

In addition to statistical and historical evidence, the record demonstrated "a plethora" of other evidence of discriminatory intent under *Arlington Heights*, including departures from the normal procedural sequence and administrative history. *Jean I* (J.A. 251). For example, INS officials departed from their normal procedures in the treatment of aliens by intentionally cutting off the Haitians' rights to claim asylum,[22] and by denying them fair hearings. *Jean I* (J.A 256 n.40); *Louis I* (J.A. 63).

Further, the evidence of administrative history demonstrated that enforcement officials intentionally singled out Haitians for discriminatory treatment. *Jean I* (J.A. 252). Indeed, the INS established a special code number for Haitians which appeared "on a variety of documents alarming as to both their number and content." *Jean I* (J.A. 257).[23] Internal documents of the INS itself demonstrated an awareness that the detention policy would have its greatest impact on black Haitians who amounted to a tiny fraction of aliens similarly situated. *Jean I* (J.A. 258). Other INS documents demonstrated that low-level officials singled out Haitians for disparate treatment both before and after the President adopted a uniform detention policy in the summer of 1981. *Jean I* (J.A. 258).[24]

United States, 460 F. Supp. 458 (S.D. Fla. 1978). They have unlawfully denied Haitians the right to work during the pendency of their asylum claims. *National Council of Churches* v. *Egan*, No. 79-2959-Civ-WMH (S.D. Fla. 1979). They have unlawfully denied Haitians access to information to support their asylum claims. *National Council of Churches* v. *Immigration and Naturalization Service*, No. 78-5163-Civ-JLK (S.D. Fla. 1979). They have unlawfully denied Haitians the very right to be heard on their asylum claims, and have subjected them to a special "Haitian Program." *Haitian Refugee Center* v. *Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom. Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982). They have unlawfully denied Haitians their right to counsel and to fair process in their exclusion hearings by shipping them, like cattle, to remote areas of America. *Louis I* (J.A. 60-62). *See Jean I* (J.A. 287).

[22] Px. 94 at 1 (R. at Vol. 38, p. 162) ("[Haitian] aliens will immediately be served with Notice to Appear for exclusion hearings before they can make asylum applications to the District Director, thus cutting off that option.").

[23] *See, e.g.*, Px. 80 (R. at Vol. 48, p. 2048), "Report as to status of space for detention and prior surveys" (David Crosland, General Counsel INS to David Hiller, Special Assistant to the Attorney General, 19 May 1981); Px. 86 (R. at Vol. 47, p. 1830), "Contingency Plan for the Detention of Cubans/Haitians in Florida and Other Locations" (Hugh J. Brian, Action Associate Commissioner, Enforcement to Doris Meissner, Deputy Commissioner, 27 April 1981) (specifically referring to eliminating the right to apply for asylum to the District Director); Px. 92 (R. at Vol. 47, p. 1834), "Cuban/Haitian Policy" (Crosland to Hiller, 2 April 1981) (detention of Haitians and Cubans); Px. 94 (R. at Vol. 38, p. 162), "Haitian Policy" (Crosland to Kenneth Starr, Counselor to the Attorney General, 20 March 1981) (deprive Haitians of the right to claim political asylum before District Director; detention for Haitians despite fact that appeal process could extend over one year).

[24] The best example of this is Px. 1 (R. at Vol. 38, pp. 138-39) a telex from the Regional Commissioner, Dallas to INS District Director, New Orleans, INS Associate Commissioner for Enforcement, and INS Associate Commissioner for Detention and Deportation, dated September 2, 1981, requiring that "Haitians . . . be detained . . . ."

d. No Justification Existed Or Was Offered For The Proven Invidious Discrimination Against Petitioners

Respondents never refuted any of the evidence of invidious discrimination, except to protest that they did not intend to discriminate. The incarceration of Haitians in an invidiously discriminatory manner was also devoid of any justification. The Haitians posed no threat to the national security, were not likely to abscond, and represented an insignificant number of undocumented aliens seeking entry into the United States. *Jean I* (J.A. 255 n.38); *Louis IV* (J.A. 178). Indeed, the Haitians represented less than two percent of the undocumented immigration into the United States. *Jean I* (J.A. 255 n.38).

Moreover, INS officials conceded that the Haitians were not incarcerated because they were a threat to national security or likely to abscond. R. at Vol. 43, p. 1160; Vol. 47, p. 2035; Vol. 49, pp. 2338, 2396, 2398.

Respondents did not attempt to justify their discriminatory actions on these or on any other grounds. Rather, they merely contended that they had not discriminated against the Haitians, a contention totally belied by the record. As the panel opinion noted:

> All told plaintiffs mustered an impressive array of witnesses and an equally impressive number of documents to demonstrate circumstantially, and to an extent directly, intentional government discrimination against Haitians. This evidence, in addition to the statistical evidence, was unrebutted but for the government's testimonial evidence, which can at best be termed "mere protestation." Without evidence of similar mistreatment of other immigrant groups, the district court had no factual basis for finding these practices were directed at others, or that they would be directed to others who were similarly situated. Based on the lack of evidence, the district court's findings are clearly erroneous.

Jean I (J.A. 259).

5. The Devastating Effect Of Incarceration

INS officials discriminated against Haitians not only in the initial and then prolonged incarceration of class members, but also in the manner in which they incarcerated them. Haitians were shipped to federal prisons and INS detention facilities throughout the United States, which were located in "desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any, Creole interpreters." *Louis I* (J.A. 61). For example, INS officials shipped Haitians, already represented in Florida by immigration lawyers, from Florida to isolated desert areas such as Big Springs, Texas or other isolated areas such as Raybrook, New York, where immigration counsel were unavailable. INS had never before treated any other race or nationality in this manner. R. at Vol. 42, p. 977; Vol. 38, pp. 161, 219 (testimony of Charles Gordon). They separated husbands and wives and parents and children, with "cruel results." *Louis III* (J.A. 125 n.24); R. at Vol. 43, p. 1141; Vol. 44, pp. 1479-81. They applied the detention policy to Haitian children, *Louis III* (J.A. 126-27 n.24), Px. 45 (R. at Vol. 45, pp. 1529-1531), Px. 46 (*id.* at 1561-1562), Px. 47 (*id.*); the elderly, Px. 47 (R. at Vol. 45, pp. 1561-1562), Px. 48 (*id.*); and those with medical problems. Px. 47 (*id.*), Px. 48 (*id.*). They held petitioners in substandard facilities and subjected them to harsh conditions, R. at Vol. 41, pp. 918-19, in sharp contrast to asylum seekers of other nationalities.[=] They physically abused some Haitians, R. at Vol. 43, pp. 1224, 1251, and denied others appropriate care for their medical conditions. *Id.* at 1258. They moved some Haitians to other facilities at night, without allowing them to take their own clothes or belongings and without telling them where they were going, leading some to be terrified that they were being taken to Haiti. R. at Vol. 41, pp. 923-25. The district

[=] In contrast to the Haitians, INS officials treated other similarly situated groups in a humane fashion. Larry Mahoney, the Public Affairs Officer for the Department of State in the Cuban/Haitian Task Force from July 1980 to May 1981, noted the incredible disparity between Cuban and Haitian refugees detained at Krome. He stated poignantly that Haitians "were not being treated the same as the Cubans were" at Krome. R. at Vol. 43, p. 1143. He noted the discriminatory treatment that Haitians previously received "still exists at Krome." *Id.* at 1140-41. Mahoney recounted that Krome, commonly referred to as the "Caribbean Ellis Island," provided completely different services for Cubans and Haitians. Cubans were able to resettle swiftly, and substantially more resources were put toward their resettlement than that of the Haitians. *Id.* at 1148-50. Moreover, while Haitians were always segregated by sex and had no access to telephones, Cuban families were allowed to stay together and a bank of telephones was put in "almost overnight" for the Cubans. *Id.* at 1140-42. In addition, Cubans were provided recreational facilities and trips outside of Krome. His request to provide the same facilities to Haitians was denied. *Id.* at 1143.

court aptly concluded that the INS was playing a "human shell game" with the Haitians. *Louis I* (J.A. 61).

The effect of such long-term and isolated detention was devastating. Master's Report and Recommendations at 12, 14, 15, 16, 18 (R. 2112, 2114, 2115, 2116, 2118); Px. 62.1A (R. at Vol. 39, pp. 335-36). The mental health of many of the Haitians in detention deteriorated rapidly under these conditions. R. at Vol. 39, pp. 370-371; Vol. 42, p. 1058. Indeed, one of the named plaintiffs, Prophete Talleyrand, committed suicide while incarcerated during the pendency of this litigation.

* * *

After carefully reviewing the evidence presented to the trial court, the panel affirmed the district court's conclusion that the fifth amendment applied to excludable aliens, such as the Haitian petitioners, but reversed as "clearly erroneous" its factual determination that petitioners had failed to carry their burden of proving that government officials had intended to discriminate in the incarceration of the Haitians. *Jean I* (J.A. 290).[26] The panel remanded to the district court, ordering it to grant broad injunctive relief prohibiting future invidious discrimination against petitioners. *Jean I* (J.A. 291).

On August 16, 1983, the court of appeals ordered rehearing *en banc*. On February 28, 1984, the *en banc* court dismissed the government's appeal on the APA issue as moot and remanded to the district court with instructions to vacate the injunctive relief based on the APA violation. *Jean II* (J.A. 295). The *en banc* court, which neither questioned nor rejected the panel's factual findings of invidious discrimination, nevertheless reversed the panel's holding that such discrimination could violate the Constitution. The *en banc* court found that low-level executive branch officials possess power in immigration matters that is wholly unrestrained by the Constitution. It held broadly that "excludable aliens such as the Haitian plaintiffs have no constitutional rights with respect to their applications for admission, asylum or parole." *Jean II* (J.A. 341).

[26] The procedural history of the litigation prior to the panel's decision is summarized in the Petition for a Writ of Certiorari at 11 n.6.

The *en banc* court suggested that a non-constitutional standard to measure abuse of discretion could be employed by the district court on remand, although it was unclear what issues would be subject to this standard. It purports to be a standard solely for reviewing alleged abuses of discretion by INS enforcement officials. It is not, however, a standard for reviewing the petitioners' claims of discrimination.[27] Four members of the *en banc* court dissented from the court's constitutional conclusions and its standard for reviewing abuses of discretion by low-level agency officials. *Jean II* (J.A. 346-54).

On May 4, 1984, the court of appeals denied petitioners' request for rehearing *en banc*, (J.A. 355), and for a stay pending petition for a writ of certiorari, and entered its final judgment on rehearing *en banc*. (J.A. 356). On August 1, 1984, petitioners timely filed a petition for writ of certiorari, which this Court granted on December 3, 1984. 105 S.Ct. 563 (1984).

SUMMARY OF ARGUMENT

1. No principle is more fundamental to this nation than that invidious discrimination on the basis of race and national origin by government officials has no acceptable place in our society. The unprecedented holding of the court below—that the action of INS enforcement officials in incarcerating petitioners solely on the basis of their race and nationality is wholly beyond

[27] The remand is directed only to those "class members presently in detention." *Jean II* (J.A. 330). The remand is not directed to, and provides no relief for, the approximately 1700 class members who have been released from detention. In the absence of reversal of the *en banc* court's decision by this Court, these petitioners would be deprived of injunctive relief to prevent the recurrence of the pattern of discrimination to which Haitians have been subjected for ten years by INS officials. *See Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971); *Jean I* (J.A. 290-91).

constitutional scrutiny—is fundamentally at odds with this basic principle.

Neither legal precedent nor the facts of this case could possibly justify the *en banc* court's conclusions. This case does not present a challenge to the power of Congress or the Executive to admit or deny admission to aliens. It merely challenges invidious discrimination in incarceration on the basis of race and nationality against black Haitian refugees by INS enforcement officials.

Petitioners are persons "in any ordinary sense of that term," *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982), and, as such, are entitled to challenge invidiously discriminatory incarceration by INS enforcement officials. No government interest could ever justify the total absence of constitutional scrutiny of such discrimination.

2. The *en banc* court refused to subject respondents' incarceration of these black Haitian refugees to any constitutional review because, in its view, the discriminatory incarceration was somehow related to the important government interest in controlling the entry of aliens. Not only is the *en banc* court's premise false both factually and legally, but its constitutional conclusion would not follow in any event. On the facts of this case, there was no danger that temporary release on parole would lead to absconding or risk the nation's security—the traditional reasons supporting detention—and INS officials conceded as much. *See* pp. 17-18, *supra*. Nor has the temporary release of these petitioners pending determination of their asylum claims been tantamount to their admission. Parole determinations are entirely separate from admission both factually and legally, and have no effect on immigration status. *Leng May Ma* v. *Barber*, 357 U.S. at 190; 8 U.S.C. § 1182(d)(5)(A). As a result, parole does not interfere with the power of Congress and the President to determine admission questions and does not implicate the considerations of national sovereignty and separation of powers that insulate admission questions from close judicial scrutiny.

Petitioners do not contend that the Constitution requires the adoption of any particular substantive policy in regard to detention or parole, but only that whatever policy is adopted must be applied in an evenhanded manner. Even assuming *arguendo* a relationship between incarceration and admission, *discriminatory* incarceration simply does not implicate any legitimate concerns pertaining to the regulation of admission of aliens into our country.

In any case, even the broad power concededly possessed by Congress and the President to regulate admission into the country, and in appropriate cases to make distinctions in admission based on nationality, is not immune from constitutional scrutiny. *Fiallo* v. *Bell*, 430 U.S. 787, 793 n.5 (1977); *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889). *A fortiori* where Congress and the President have chosen not to draw such distinctions in the application of incarceration pending a determination of admissibility, and where the Attorney General announced and intended an evenhanded policy, discriminatory incarceration by subordinate enforcement officials must receive constitutional scrutiny. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976).

3. Furthermore, the *en banc* court's conclusion was based on a fundamental misreading of *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), which it believed "controlled" its decision. *Mezei*, however, is not controlling because the Court's holding rested upon the recognition that Mezei's incarceration, unlike the incarceration here, was to continue his previously determined exclusion order. While Mezei's release would have "nullified" his exclusion order based on national security and would have granted him a *de facto* admission because no other country would accept him, neither of those factors is present here. Moreover, this case does not, as did *Mezei*, implicate procedural due process hearing rights, but rather the equal protection of the law. Further, the premises underlying the result in *Mezei* have been rejected by subsequent constitutional developments.

ARGUMENT

I. BLACK HAITIAN REFUGEES ARE ENTITLED TO EQUAL PROTECTION OF THE LAW

No principle is more fundamental to our nation's history or values or more firmly established in our law than that invidious discrimination on the basis of race and national origin by government officials has no acceptable place in our political and social life.[28] The Eleventh Circuit's unprecedented holding—that the actions of INS enforcement officials in incarcerating petitioners solely on the basis of their race and nationality is wholly beyond constitutional scrutiny—is fundamentally at war with this basic principle. Nothing in the facts of this case[29] can justify the Eleventh Circuit's conclusion, and no overriding governmental interest is at stake that could possibly justify a

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[28] No value is more enshrined in our law or in our nation's life than the non-discrimination principle contained in the fifth and fourteenth amendments. As Chief Justice Taft wrote for the Court in *Truax* v. *Corrigan*, 257 U.S. 312, 332 (1921), "Our whole system of law is predicated on the general, fundamental principle of equality of application of the law." Moreover, discrimination based on race and national origin "strikes at the core concerns" of the fifth and fourteenth amendments "and at fundamental values of our society and our legal system." *Rose* v. *Mitchell*, 443 U.S. 545, 564 (1979). This Court recently reemphasized the "important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race." *Palmore* v. *Sidoti*, 104 S.Ct. 1879, 1881 (1984). Indeed, in *Lee* v. *Washington*, 390 U.S. 333 (1968), this Court affirmed that even a class of persons whose substantive liberty interests have largely been extinguished by their valid convictions—sentenced prisoners—may not be subjected to racial discrimination, a holding reiterated just this past term. *Hudson* v. *Palmer*, 104 S.Ct. 3194, 3198 (1984) ("invidious racial discrimination is as intolerable within a prison as outside"). The same core concerns apply equally to matters concerning discrimination based upon national origin. *Hernandez* v. *Texas*, 347 U.S. 475, 479 (1954); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

[29] *See* pp. 17-18, *supra*.

total absence of constitutional scrutiny. Indeed, even during the most extreme emergency such as the perceived threat of invasion and sabotage in the midst of a world war, this Court subjected discriminatory incarceration to constitutional scrutiny. *Korematsu* v. *United States*, 323 U.S. 214 (1944). Nor do separation of powers concerns that would ordinarily command judicial deference to the political branches of the federal government apply where, as here, those political branches have established a neutral policy that was then applied by low-level agency officials "with an evil eye and an unequal hand . . . ." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886).

A. Excludable Aliens Are "Persons" Protected By The Fifth Amendment

The equal protection guarantee of the fifth amendment protects all "persons" without qualification. The fifth amendment provides that "No *person* shall . . . be deprived of life, liberty, or property, without due process of law . . . ." (Emphasis added). This language could not be more explicit. Unlike the limitation of citizenship under the privileges and immunities clause of the fourteenth amendment, or the requirement that a person be "within the jurisdiction" of a state under the equal protection clause of the fourteenth amendment, the fifth amendment permits neither a geographic nor a citizenship limitation. It encompasses all persons wherever situated, including all aliens. *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien surely is a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth amendments."); *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1975) ("Even [an alien] whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896) ("all persons within the territory of the United States are entitled to the protection guaran-

teed by [the fifth amendment]");[30] *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction . . . ."); *Ex parte Milligan*, 71 U.S. (4 Wall.) 281, 295 (1866) ("The Constitution . . . covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

The fifth amendment protects citizens and foreign nationals without distinction, including friendly aliens, *United States* v. *Pink*, 315 U.S. 203, 228 (1942), aliens outside the United States, *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931), citizens challenging actions by the United States taken against them outside the country, *Reid* v. *Covert*, 354 U.S. 1 (1957); *Balzac* v. *Porto Rico*, 258 U.S. 298, 312-13 (1922) ("The Constitution of the United States is in force . . . wherever and whenever the sovereign power of [the] government is exerted"), aliens illegally within the country, *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982); *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976), and excludable aliens stopped at the border or allowed into the country but considered as though stopped at the border.[31] Thus, any person may invoke the fifth amendment to

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[30] In *Wong Wing*, this Court recognized that regardless of an alien's status in this country, federal courts may review challenges to his detention under the fifth amendment. Although the aliens involved in *Wong Wing*, under present terminology, would be deemed deportable rather than excludable aliens, the decision in *Wong Wing* occurred before this Court's decision in *The Japanese Immigrant Case (Kaoru Kamataya* v. *Fisher)*, 189 U.S. 86 (1903), adopting this distinction. As a result, the broad language in *Wong Wing* defining aliens as "persons" within the coverage of the fifth amendment should not be limited to deportable aliens. Ironically, this principle was recognized by even the *en banc* court. *Jean II* (J.A. 318 n.22).

[31] *Augustin* v. *Sava*, 735 F.2d 32, 37 (2d Cir. 1984); *Yiu Sing Chun* v. *Sava*, 708 F.2d 869, 877 (2d Cir. 1983); *Rodriguez-Fernandez* v. *Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981); *United States* v. *Henry*, 604 F.2d 908, 913 (5th Cir. 1979); *see also United States* v. *Demanett*, 629 F.2d 862 (3d Cir.), *cert. denied*, 450 U.S. 910 (1980) (fourth amendment rights).

challenge action by the United States government, regardless of his immigration status and regardless of whether he is or is deemed to be inside the country, outside of it, or "at the border." Plainly, if an excludable alien (or even an alien corporation) not within the territorial boundaries of the United States may invoke the protections of the fifth amendment, as may an unlawful alien within our boundaries, an excludable alien who, although physically present within our boundaries is deemed to be "at the border" for immigration purposes, is protected by the Constitution. As persons "in any ordinary sense of that term," *Plyler* v. *Doe*, 457 U.S. at 210, excludable aliens such as the Haitian petitioners cannot be barred from invoking the Constitution to challenge governmental actions taken against them.

The *en banc* court's failure to recognize or address the primary question of the fifth amendment's coverage led that court into fundamental error. The *en banc* court confused the fact that all "persons" such as the Haitian petitioners are covered by the fifth amendment, with the extent of the reach of their constitutional protection in differing contexts. Although in certain contexts important governmental interests may outweigh fifth amendment claims, particularly those advanced by classes of persons with reduced liberty interests—such as sentenced prisoners, public school students, and aliens—*every* "person" is entitled to assert fifth amendment claims and to invoke judicial scrutiny of invidiously discriminatory governmental conduct. This confusion was evident in the *en banc* court's unsuccessful attempt to distinguish such cases as *Russian Volunteer Fleet* and *Wong Wing*. The *en banc* court found that these cases did not control the question of whether excludable aliens may assert constitutional rights because they did not involve national power over immigration (*Russian Volunteer Fleet)* or because even where they did, the alien was subjected to a different form of governmental power—criminal prosecution (*Wong Wing*). *Jean II* (J.A. 319-20). These distinctions, of course, are of no consequence when deciding whether an alien is a "person" within the meaning of the fifth amend-

ment. Both *Russian Volunteer Fleet* and *Wong Wing* stand for the proposition that excludable aliens are persons within the meaning of the fifth amendment and are protected by the Constitution.

B. None Of The Cases Cited By The Lower Court Could Possibly Justify A Finding That Petitioners Are Not Persons Within The Meaning Of The Fifth Amendment

Similarly, the lower court's reliance on such cases as *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892), *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 600 (1953), *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), and *Landon* v. *Plasencia*, 459 U.S. 21 (1982), for the proposition that excludable aliens have no constitutional rights, *Jean II* (J.A. 307-08), ignores the distinction between coverage under the fifth amendment and the scope of that coverage. Although these cases may recognize that an excludable alien may have no substantive constitutional liberty interest in admission to our country,[32] and that his procedural due process rights concerning determination of his admissibility are reduced,[33] none holds

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[32] *See, e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional right regarding his application"); *Kwong Hai Chew* v. *Colding*, 344 U.S. 589, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores," *quoting Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) ("an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government."); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892).

[33] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. at 212 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. at 544 (same); *Nishimura Ekiu* v. *United States*, 142 U.S. at 660.

that excludable aliens have no constitutional rights in any immigration context or that they are not persons within the meaning of the fifth amendment.[34] And none even hints that government officials can deprive a person of physical liberty solely on the basis of his race or national origin wholly free from constitutional scrutiny, particularly where high-level executive officials and Congress have decreed otherwise.[35]

II. PERMITTING CONSTITUTIONAL SCRUTINY OF DISCRIMINATORY INCARCERATION BY IMMIGRATION ENFORCEMENT OFFICIALS OF EXCLUDABLE ALIENS PENDING A DETERMINATION OF THEIR ADMISSIBILITY WOULD NEITHER HAMPER THE EXECUTIVE'S ENFORCEMENT OF IMMIGRATION LAWS NOR INTERFERE WITH THE SOVEREIGN AUTHORITY OF CONGRESS AND THE PRESIDENT TO DECIDE WHO WILL BE PERMITTED ENTRY INTO OUR SOCIETY

The *en banc* court refused to subject respondents' incarceration of these black Haitian refugees to any constitutional review because in its view the discriminatory incarceration was somehow related to the important government interest in controlling the entry of aliens into our country. On the facts of this case, however, there was no danger that temporary release on

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[34] The unnecessarily broad language in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 600 (1953), that " 'excludable' aliens . . . are not within the protection of the Fifth Amendment," was not only dictum wholly unrelated to the Court's holding concerning a returning resident alien, but when read in context, plainly does not suggest that excludable aliens may not assert fifth amendment protections. It suggests only that they may not assert procedural due process protections in connection with admissibility greater than provided.

[35] The lower court relied on *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), which it found "controlling" on this issue, and on language in *Wong Wing* v. *United States*, 163 U.S. 228 (1896), and *Carlson* v. *Landon*, 342 U.S. 524 (1952). *See Jean II* (J.A. 312, 309-323). As demonstrated below, at pp. 39-46, *Mezei* clearly does

parole would lead to absconding or risk the nation's security. *See* pp. 17-18, *supra*. Nor has the temporary release of these petitioners pending determination of their asylum claims been tantamount to their admission. Parole determinations are entirely separate from admission both factually and legally, do not implicate national sovereignty, and have no effect on immigration status. Moreover, *discriminatory* incarceration simply does not implicate legitimate concerns pertaining to the regulation of admission of aliens into our country.

In any case, even the broad power concededly possessed by Congress and the President to regulate admission into the country, and in appropriate cases to make distinctions in admission based on nationality, is not immune from constitutional scrutiny. *A fortiori* where Congress and the President have chosen not to draw such distinctions in the application of incarceration pending a determination of admissibility, and where the Attorney General announced and intended an evenhanded policy, discriminatory incarceration by subordinate enforcement officials must receive constitutional scrutiny.

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not control the present case since the Court in *Mezei* was addressing an entirely different issue—detention as the continuation or effectuation of a previously rendered decision that an alien was excluded, a circumstance where the question of detention and inadmissibility are not merely related but are one and the same. The lower court's reliance on *Wong Wing* and *Carlson* was equally misplaced. Both cases stand for the very proposition asserted here: that the detention of aliens *is* subject to constitutional scrutiny even when it is asserted that detention is related to admission. Indeed, this Court has long recognized that the incarceration of a person by the government is subject to constitutional scrutiny. *Korematsu* v. *United States*, 323 U.S. 214 (1944).

A. The Considerations Of National Sovereignty And Separation Of Powers That Insulate Decisions Concerning Admission Of Aliens Into Our Country From Close Judicial Scrutiny Simply Do Not Apply To Decisions Concerning Incarceration Of Aliens Pending A Determination Of Their Admissibility

The *en banc* court believed that extending any constitutional protection against discriminatory incarceration to these excludable aliens would hamper the authority of the Executive to enforce our immigration laws and "control our borders." In the court's view, such protection would also interfere with congressional and executive authority to make sovereign decisions as to who will be admitted or denied admission into our society, since parole determinations are somehow related to admission. Neither the relief the petitioners seek, the facts of this case, nor the *en banc* court's reliance on the mantle of national sovereignty can justify its conclusion.

Petitioners do not contend that the Constitution requires the adoption of any particular substantive policy in regard to detention or parole, but only that whatever policy is adopted must be applied in an evenhanded manner. Even the Executive has not asserted that we ought to have a discriminatory policy. The *en banc* court confused the issue by treating petitioners' request for equal treatment as if it were a request for a substantive parole or detention policy.

Moreover, the record in this case demonstrates that the release of the petitioners, whose continued detention was based upon race and nationality and not upon traditional concerns of security or public safety, would not erode or hamper the executive's ability to enforce our immigration laws. The traditional concerns of detention—to restrict absconding and to protect the public safety and national security—were never in issue here. *See* pp. 17-18, *supra*. As both the panel and the district court correctly found, Haitian refugees posed no threat to the national security, were not likely to abscond, and represented an insignificant number of undocumented aliens. *Jean I* (J.A. 255 n.38); *Louis IV* (J.A. 178). Indeed, even the INS

conceded at trial that petitioners were not incarcerated because they were a threat to national security or because they were likely to abscond. *See* pp. 17-18, *supra*. Further, Haitians constituted less than two percent of the undocumented immigration into the United States. *See* p. 17, *supra*. The temporary parole of Haitians, therefore, could not and did not affect these concerns.

Similarly, the *en banc* court's theoretical concern, that granting temporary parole would interfere with the power of Congress and the President to determine admission questions, is unfounded. Temporary release on parole is simply not tantamount to admission, factually or legally. Temporary release from incarceration (parole) is a distinct event from admission, and provides neither the benefits of admission nor any legal status equivalent even to that of a visitor temporarily admitted. *Leng May Ma* v. *Barber*, 357 U.S. at 190 (temporary release or parole from incarceration does not create an admission into the United States, but is "simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status . . . ."); *Kaplan* v. *Tod*, 267 U.S. 228, 230-31 (1925). Congress has also recognized this distinction. The very statute at issue here plainly provides that the parole of an alien from incarceration "shall not be regarded as an admission of the alien and when the purposes of such parole shall . . . have been served the alien shall forthwith return or be returned to the custody from which he was paroled . . . ." 8 U.S.C. § 1182(d)(5)(A) (1982).[36]

Moreover, the facts of this case demonstrate that the temporary release of an alien pending a determination of his asylum

[36] Indeed, the *en banc* court's concern that release would "erode" the admissions process, *Jean II* (J.A. 322), is inconsistent with Congress' authorization of the benefits of temporary release, while recognizing that such release would not result in admission, 8 U.S.C. § 1182(d)(5)(A), and with the long-standing administrative practice which favored release from 1954 until this case. R. at Vol. 38, pp. 123-30 (testimony of Charles Gordon); R. at Vol. 38, pp. 211-18 (testimony of Sam Bernsen); R. at Vol. 40, p. 611 (testimony of James Orlow); *Leng May Ma*, 357 U.S. at 190 (parole policy reflects an "enlightened civilization").

claim does not affect the government's ability to deny him admission. Although many of the petitioners in this case were released after a year of detention, their release has not resulted in their admission, legally or factually. They are still subject to exclusion and physical removal to Haiti, as the lower court recognized. *Jean II* (J.A. 322 n.26). In fact, many have already been ordered excluded.[37] As persons temporarily released pending a determination of their admissibility, they share none of the rights or benefits of aliens admitted, even temporarily, into the United States. They are all subject to strict reporting requirements; their physical movement is restricted; their temporary parole may be terminated at any time; and they remain separated from family members abroad who have no right to enter the United States to join them. *Louis IV* (J.A. 179-85).

Not only did the lower court err in its belief that detention was integrally related to admission, but even if its premise were correct, its constitutional conclusion is not. Even if admission decisions are committed to the political branches of our government, questions relating to detention simply are not. To suggest that the two are related in some fashion does

[37] Although many of the Haitians have been released by the district court judge due to his finding that the government violated the rule-making requirements of the APA, they are currently undergoing exclusion proceedings. Spearheaded by the American Bar Association, various local bar associations, organized groups of immigration lawyers, human rights organizations, and many other groups have provided a majority of the released Haitians with free legal representation. Indeed, the Haitian representation effort has been widely praised. *See* Helton, *The Most Ambitious Pro Bono Ever Attempted*, 12 Hum. Rts. 19 (1984). Approximately 1,600 lawyers across the country have volunteered to represent the Haitians. *Id.* at 48.

not mean that the considerations of national sovereignty and constitutional authority that insulate the basic question of admission or exclusion from close judicial scrutiny would also apply to detention decisions, particularly when made, as here, by politically unresponsive enforcement officials.[38]

Congress and the President, when "acting within powers expressly conferred by Congress," *Nishimura Ekiu* v. *United States*, 142 U.S. at 660, have broad authority over the question of the *admission* of aliens into the United States. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. at 542; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707-11 (1893). This broad authority is recognized as an attribute of sovereignty, so that a sovereign nation, within the limits prescribed by international law, may choose whom it wishes to admit into its political community. *Fong Yue Ting*, 149 U.S. at 707-11; *Nishimura Ekiu*, 142 U.S. at 659. Indeed, this Court has upheld the decision and power of Congress to exclude aliens based solely on criteria it would find impermissible in other contexts. *Klein-*

[38] An analogy from the criminal justice system is apt. Sentenced defendants may have had their liberty interests under the Constitution extinguished to a great extent by their valid convictions. *See, e.g., Greenholtz* v. *Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979); *Meachum* v. *Fano*, 427 U.S. 215 (1976). Judicial deference to the sentencing-decisions of the Congress or of state legislatures may, in such circumstances, be particularly appropriate. A state or the federal government may choose not to have a system of parole or of clemency under which prisoners are released from custody prior to the termination of their sentence. *See Greenholtz*. If parole or clemency is provided for, however, certain constitutional implications follow. Even though prisoners may have no right to parole or clemency—it may literally be a matter of grace—they are entitled to parole or clemency consideration on a non-discriminatory basis. Surely equal protection would be offended if parole or clemency board officers targeted specific racial or national groups for discriminatory treatment notwithstanding the fact that parole and clemency are integrally related to criminal conviction and sentence. Although "related" in some fashion, the considerations that insulate sentencing decisions from scrutiny simply do not obtain when considering a claim of discrimination in the granting of parole or clemency.

dienst v. *Mandel*, 408 U.S. 753, 765-766 (1972); *Fiallo* v. *Bell*, 430 U.S. at 792. The separation of powers concerns that have led to limited constitutional scrutiny of admissions decisions and to broad deference by the judiciary to the coordinate and politically responsive branches of our government, however, do not apply to questions that do not involve admission, because such questions do not involve political decisions as to whom we will permit, even temporarily, to join our society.[39]

Moreover, even assuming *arguendo* a relationship between incarceration and admission, the court below analyzed the wrong relationship. The question is not the theoretical one of whether a uniform policy of incarceration would further the concerns that implicate admission, but whether *discriminatory* incarceration can implicate these concerns. Since Congress has explicitly rejected race and national origin as criteria for admission itself,[40] the *en banc* court's analysis cannot stand as a matter of law. In any case, whatever relationship might exist between the legitimate governmental concerns associated with detention—the prevention of absconding and security threats—and the concerns that insulate admission decisions from close judicial scrutiny, no relationship exists between these concerns and the *discriminatory* incarceration of aliens based solely on their race and national origin.[41]

[39] Indeed, this fundamental distinction is evidenced by the different criteria applied to parole and to entry even temporarily into our society. To obtain temporary admission, an alien must demonstrate the inapplicability of the same 33 separate restrictions that apply to applicants for permanent residency. 8 U.S.C. § 1182(a)(1)-(33). Congress did not require that parolees make this showing to obtain temporary parole.

[40] *See* footnote 13, *supra*.

[41] The *en banc* court's concern that a due process right to temporary release would "severely erode" the "government's power to control 'entry,' " *Jean II* (J.A. 315 n.18), is not at issue here. Petitioners here assert only an equal protection claim, and do not assert a procedural due process right in connection with release. Whatever relationship might exist between a due process hearing right for release and the concerns that insulate admission decisions from scrutiny, no relationship exists between these concerns and discriminatory incarceration.

B. Since Even Congressional And Presidential Decisions Concerning The Admission Of Aliens Are Subject To Constitutional Scrutiny, Discriminatory Incarceration By Subordinate Agency Officials Must Be Subject To Constitutional Review

It is "one of the fundamental principles of our society" that all governmental action is subject to the limitations of the Constitution. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *E.g.*, *Reid* v. *Covert*, 354 U.S. at 6 (every action by our government must be "[i]n accordance with all the limitations imposed by the Constitution."); *Korematsu* v. *United States*, 323 U.S. 214 (1944) (Presidential action authorized by Congress under war power subjected to strict constitutional scrutiny); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 295. This is, of course, true when the Congress or the President assert their broad sovereign powers to regulate immigration, whatever may be the constitutional source of that power. *The Chinese Exclusion Case*, 130 U.S. at 604 ("The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution . . . .") *Accord Fiallo* v. *Bell*, 430 U.S. at 793 n.5 ("Our cases reflect acceptance of a limited judicial responsibility *under the Constitution* even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . .") (emphasis added); *Hampton* v. *Mow Sun Wong*, 426 U.S. at 101-03; *Fong Yue Ting* v. *United States*, 149 U.S. at 713 ("the paramount law of the Constitution" limits congressional and executive power to exclude aliens).

If action by Congress and the President concerning their sovereign powers to regulate admission of aliens are subject to at least some constitutional scrutiny, *a fortiori* discriminatory action by subordinate agency officials administering a facially neutral statute intended to be applied evenhandedly by the President and the Attorney General must be subject to constitutional scrutiny, particularly where the locus of action is

not admission itself, but the distinct question of temporary release on parole.

This case does not implicate the authority of Congress, the President, or the Attorney General. Rather, it challenges the power of low-level politically unresponsive government officials to act in a manner which is contrary to federal statutes, treaty, and the directions of the President and the Attorney General, both of whom provided for a policy of nondiscriminatory enforcement. Constitutional protection against discriminatory enforcement of our immigration laws by low-level government officials does not affect the plenary power of Congress to legislate or the authority of the President to enforce immigration laws. The inherently political concerns implicit in determinations by Congress and the President, in exercising the powers of a sovereign nation, regarding admission into our political community, lose their force in the context of enforcement actions by low-level politically unresponsive officials. *See* Tribe, *American Constitutional Law* 283 (1978). Constitutional protection here ensures fidelity to law, by providing that federal statutes will be enforced consistently with their language and with the intent of Congress and the President.

In this respect, *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976), is instructive. There, this Court was unwilling to defer to the actions of the Civil Service Commissioner when he determined by regulation that non-citizen resident aliens were barred from federal employment, finding that "some judicial scrutiny . . . is mandated by the Constitution." *Id.* at 103. This was so even though the Court recognized both the narrow scope of judicial scrutiny of immigration policy and the broad character of presidential and congressional power in the immigration field. *Id.* at 101 n.21. While this Court assumed "that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified," it was not willing to reach this conclusion when the requirement was imposed by the agency. *Id.* at 105. Finding that "neither the Congress nor the President has ever *required* the Civil Service

Commission to adopt the citizenship requirement as a condition of eligibility for employment," *id.* (emphasis in original), and that neither had approved it, this Court held the agency rule unconstitutional.[42]

This case is an even more compelling one than *Hampton*. Here, the President, the Attorney General, and the Congress have established facially neutral statutes and policies. Although the President had statutory authority, through proclamation, to distinguish among classes of aliens, 8 U.S.C. § 1182(f), he declined to do so. In the face of that facial neutrality and recent congressional history disavowing *invidious* racial and nationality discrimination,[43] low-level enforcement officials subjected Haitians, but not other similarly situated groups of excludable aliens, to prolonged incarceration. As in *Hampton*, the actions of low-level politically unresponsive officials which were not adopted or approved by Congress or the President, and which the agency never attempted to justify on neutral grounds, must be found unconstitutional.

The lower court's decision that the Constitution places no limits whatsoever on executive action, including that taken by subordinate agency officials, constitutes an unprecedented abdication of the federal judiciary's role as guardian of the Constitution. The lower court's misplaced concerns about "protecting our borders" and congressional and executive sovereign powers led the judges to "close their eyes on the Constitution, and see only" the executive's power. *Marbury* v.

[42] *See also Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 308-09 (1978) (opinion of Powell, J.) (relying on *Hampton* to support the conclusion that although the legislature might have the authority to enact an affirmative action medical school admissions program to remedy past discrimination, the Regents did not have this power absent a clear legislative delegation).

[43] *See* footnote 13, *supra*.

Madison, 5 U.S. (1 Cranch) at 178.[44] In effect, the *en banc* court fell into the error condemned by this Court in *Ex parte Milligan*, 71 U.S. (4 Wall.) at 295.

> No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence . . . .

The *en banc* court's refusal to subject the actions even of low-level officials to constitutional scrutiny where race and national origin discrimination are at issue, and where the record reveals no threat to national security or legitimate concerns about protecting our borders, would leave the federal judiciary without the constitutional tools to deal with immigration practices equal to or even more outrageous than discriminatory incarceration. Surely no legitimate separation of powers concern can justify suspending the constitutional limits that our legal system places on all government officials.[45]

III. THE LOWER COURT IMPROPERLY RELIED UPON *SHAUGHNESSY* v. *UNITED STATES EX REL. MEZEI*, 345 U.S. 206 (1953), WHICH IS NOT CONTROLLING AND THE UNDERLYING PREMISES OF WHICH HAVE BEEN REJECTED

In reaching its conclusion that excludable black Haitian refugees who have suffered incarceration due to invidious racial and national origin discrimination have no constitutional

[44] Of course, recognizing the propriety of constitutional scrutiny does not mean that appropriately weighty governmental interests will be subordinated to the constitutional claim asserted. *See, e.g., Korematsu* v. *United States*, 323 U.S. 214 (1944).

[45] The lower court's non-constitutional remand standard, under which discriminatory actions of subordinate government officials would be upheld if a "facially legitimate and bona fide reason" were

protection, the *en banc* court squarely relied on *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). The court found that the decision was "controlling on this issue" and that it "forecloses us from relying on the arguments that the panel and the district court found persuasive." *Jean II* (J.A. 311-12). The *en banc* court's failure to perform an independent assessment of the applicability of the equal protection guarantee to the incarceration of petitioners was based on a fundamental misreading of this Court's decision in *Mezei*. It is not controlling here and the premises on which it was based have been seriously eroded.

A. *Mezei* Does Not Control This Case

In relying on *Mezei* as "controlling" precedent in a case of invidious race and national origin discrimination, the *en banc* court misconstrued that precedent and extended it far beyond its intended scope. *Mezei* is distinguishable both factually and legally from this case. In *Mezei*, the issue presented for review was whether an alien who had *already* been ordered excluded on the grounds of national security pursuant to a war power (not immigration) act was entitled, as a matter of constitutional right, to release because his physical removal from the United States could not be accomplished. Mezei was temporarily ordered excluded *upon arrival* in the United States without a

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invoked in justification, *Jean II* (J.A. 330), is a wholly inadequate substitute for constitutional scrutiny, particularly of discrimination. Although the scope of review of admission decisions by the Attorney General may be exceedingly narrow when applying a specific legislative standard of exclusion, *see Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the "facially legitimate and bona fide" standard is inapplicable to the actions of low-level officials in dealing with questions such as release on parole that are not equivalent to admissions decisions. This is particularly true since low-level officials do not possess the discretion to discriminate based on race and nationality in dealing even with admission questions, *see* 8 U.S.C. § 1182(f) (giving this power only to the President, to be exercised only by presidential proclamation).

hearing, pursuant to the Passport Act of 1918 and a Presidential Proclamation invoking the national security.[46] The Attorney General thereafter ordered Mezei permanently excluded without a hearing because he determined that disclosure of the nature of Mezei's threat to the national security would "be prejudicial to the public interest." *Mezei*, 345 U.S. at 210-11.

Pursuant to this order of exclusion, the Attorney General sought to remove Mezei physically from the United States, but no country would accept him. *Mezei*, 345 U.S. at 208-09. Mezei was held at Ellis Island to *continue* his already-determined exclusion until he could be physically removed from the United States. In this manner, his detention was not incidental to or merely related to his exclusion but was, as the government argued,[47] the effectuation of the Attorney General's previous exclusion order.

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[46] The Passport Act of 1918 permitted the President by proclamation to establish special restrictions on the entrance or departure of aliens into or out of the United States "[w]hen the United States is at war or during the existence of a national emergency proclaimed by the President . . . ." *Mezei*, 345 U.S. at 210-11 n.7.

[47] The distinction between detention as related to or incidental to exclusion and detention as a continuation of the exclusion order was stated quite plainly in the government's brief:

> It is the position of the United States that since the restraint is not incidental to an order but is, itself, the effectuation of the exclusion order, there is no limit to its continuance other than the statutory time limit on the authority of the Attorney General to exclude him.

Brief for the Petitioners in *Shaughnessy* v. *United States ex rel. Mezei*, at 9. According to the government:

> Here the restraint follows from the shutting out of the alien. The Attorney General has found that respondent's entry would be prejudicial to the public interest. So long as the finding is outstanding, the restraint resulting from exclusion cannot be regarded as unreasonably prolonged regardless of how long it continues.

Id. at 28.

For this reason, this Court addressed both the propriety of Mezei's exclusion order and "the issue of respondent's *continued* exclusion on Ellis Island." *Mezei*, 345 U.S. at 215 (emphasis added). In the bulk of its opinion, this Court discussed the propriety of Mezei's order of exclusion. *Mezei*, 345 U.S. at 210-15.[48] Only the final two paragraphs of the opinion addressed the question of whether Mezei's exclusion should be continued or whether he should be released because no other country would accept him. This Court held "that [Mezei's] *continued exclusion* [does not] depriv[e] him of any statutory or constitutional right." *Mezei*, 345 U.S. at 215 (emphasis added). Accepting the government's argument, this Court found that "to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding . . . ." *Id.* at 216.[49]

In sharp contrast to the factual and legal determinations in *Mezei*, the present case involves the question of equal treatment in detention and parole *prior* to any determination of excludability. The petitioners here challenge the actions of low-level officials, rather than those of the Attorney General as in *Mezei*. Moreover, petitioners do not challenge the substantive basis for incarceration as in *Mezei*, but rather the invidiously discriminatory application of a parole provision.[50] In *Mezei*, discriminatory application of parole was not asserted or at issue. Further, at the time Mezei's case arose, no statutory provision expressly authorizing parole existed, a factor which influenced the Court's decision in *Mezei*. 345 U.S. at 216 nn.14-15. In this case, there is such a statutory authorization. 8 U.S.C. § 1182(d)(5)(A). In addition, the rationale of *Mezei*, that detention was merely a continuation of a previously determined exclusion order, is not applicable here because petitioners were detained *prior* to a finding of excludability, and because petitioners, unlike Mezei, can be physically removed from the United States and returned to their country of origin, which has expressed its willingness to accept them. *Jean II* (J.A. 322 n.26). Their temporary parole would not, as with Mezei, be tantamount to admission and would not, as in *Kaplan* v. *Tod* and *Mezei*,[51] bootstrap them into admission. Unlike Mezei's release, which would have thwarted the political branches' sovereign control over admission and would have "nullifie[d] the very purpose of the exclusion proceeding," *Mezei*, 345 U.S. at 216, the grant of temporary parole, on a nondiscriminatory basis, pending a determination of petitioners' claims for political asylum, would not frustrate Congress' will.

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[48] The broad language in *Mezei*, that "the power to expel or exclude aliens [is] a fundamental sovereign attribute," *Mezei*, 345 U.S. at 210, went to the propriety of Mezei's exclusion order, *not* to the issue of his continued detention. Petitioners here do not challenge this broad authority when it is addressed, as it was in *Mezei*, to the issue of exclusion.

[49] In its brief in *Mezei*, the government argued that "where an alien is ordered excluded for reasons of internal security, pursuant to the mandate of Congress and the President, it cannot be unreasonable to continue his detention for the purpose of debarring him from the United States so long as his entry continues to be a menace to the safety of the United States." Brief for the Petitioners, at 29.

[50] However broad may be the Attorney General's substantive discretion to make parole decisions, such decisions are not immune from constitutional scrutiny in all contexts. Prosecutorial discretion is largely beyond judicial scrutiny, but not if invidious discrimination is involved. *Oyler* v. *Boles*. 368 U.S. 448 (1962). Whatever limitations *Mezei* may place on the procedural or substantive rights of a detained alien who has been excluded, those limitations do not extend to equal protection.

[51] Only temporary parole is involved here. *See* footnote 10, *supra*. Unlike the case here, where petitioners are subject to exclusion and physical removal since Haiti is willing to accept them, *Jean II* (J.A. 322 n.26), the parole sought by Mezei would have been a *de facto* admission, not permitted under *Kaplan*, because the United States could not deport Mezei as no country would accept him. *Mezei*, 345 U.S. at 208.

Most importantly, the lower court's decision to extend *Mezei* to insulate from constitutional scrutiny invidious race and nationality discrimination results from its misunderstanding of that decision. The *en banc* court's decision ignored the central distinction between the existence of constitutional protection and the extent or scope of that protection. In *Mezei*, this Court did not hold that Mezei had *no* constitutional rights or that his detention was justified by extra-constitutional authority, but only that the extent of his procedural and substantive due process rights to parole were limited under the peculiar facts of that case. The extent of equal protection guarantees for excludable aliens was not decided, or even at issue, in *Mezei*.[52]

B. The Underlying Premises Of *Mezei* Have Been Rejected By Subsequent Constitutional Developments

In any event, the premises underlying *Mezei* have been undercut by subsequent constitutional developments. Five years after this Court decided *Mezei*, a plurality of the Court

[52] The decision to regard *Mezei* as a "controlling" precedent which sanctions invidious discrimination is particularly dubious in light of congressional enactments and decisions of this Court subsequent to that decision. In 1954, this Court determined conclusively that the fifth amendment did encompass equal protection guarantees which apply to the federal government. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). In January 1965, the Congress abolished the national quota system thereby eliminating the vestiges of invidious racial or nationality based discrimination in the immigration statutes. The legislative history is replete with references to the need to eliminate invidious discrimination. Hearings on S.500, 89th Cong., 1st Sess., Part 1, 45-48, 217-20 (1965); 111 Cong. Rec. H21759, H21764, H21787, S24238 (1965). The 1965 Act not only abolished the national origin quota system, but also specifically established a statutory bar to invidious discrimination based on race and nationality. 8 U.S.C. § 1152(a) (1982). Additionally, the Refugee Act of 1980 specifically sought to end nationality based distinctions in our treatment of refugees by accepting the definition of refugee contained in the United Nations Convention and Protocol. S. Rep. No. 590, 96th Cong., 2d Sess., 19 (1980); 8 U.S.C. § 1101(a)(42) (1982).

strongly suggested disapproval of *Mezei's* extreme position when it stated that the decision created an "intolerable situation." *Trop* v. *Dulles*, 356 U.S. 86, 102 n.36 (1958). More recent developments have eviscerated *Mezei's* rationale. *Mezei* rested upon three assumptions which are no longer valid: (1) that the *exclusion power* is a special governmental power not subject to constitutional limitations; (2) that procedural due process did not apply because the release of an excludable alien from detention is a privilege, not a right; and (3) that the Constitution has no extraterritorial effect. None of these assumptions has continuing vitality. First, this Court, subsequent to *Mezei*, has repeatedly rejected, *in a variety of contexts*, the argument that the government has inherent powers which are not subject to constitutional limitation. *See, e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713, 719 (1971); *Afroyim* v. *Rusk*, 387 U.S. 253, 257 (1967); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164-165 (1963); Section IIB, *supra*. Second, the rights-privilege distinction has been rejected as a basis for determining the applicability of procedural due process.[53] Finally, the claim that the Constitution does not reach excludable aliens because they are "outside" of the United States has been squarely rejected. *Reid* v. *Covert*, 354 U.S. 1 (1957).[54]

[53] *E.g.*, *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Bell* v. *Berson*, 402 U.S. 535 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 262-63 (1970); *see* Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

[54] In addition to its diminishing vitality in light of subsequent constitutional developments, the majority's opinion in *Mezei* has been scathingly criticized by the commentators. Professor Hart in *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1392-96 (1953), described the majority's opinion as an "aberration" which "ignores the painful forward steps of a whole century of adjudication." More recent commentaries have described the decision and that of *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), in even

Surely the views articulated by Mr. Justice Jackson in his dissent in *Mezei* are more consonant with modern constitutional doctrine:

> Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law?
>
> Congress has ample power to determine whom we will admit to our shores and by what means it will effectuate its exclusion policy. The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction . . . .

Mezei, 345 U.S. at 226-28 (Jackson, J., dissenting).

In sum, *Mezei* is simply not controlling here. It should not be extended beyond the Cold War context of its narrow, unique facts. In any event, its premises have been eviscerated by subsequent decisions of this Court and it should not be applied to sanction invidious discrimination.

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the decision of the *en banc* court, reinstate the panel

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less sympathetic terms as "a rather scandalous doctrine, deserving to be distinguished, limited or ignored." Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983). *See also* 2 K. Davis, *Administrative Law* § 11.5 (2d ed. 1979); Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 20 (1984); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum. L. Rev. 957 (1982). Indeed, even the lower court recognized that the decision has been "heavily criticized" and is "controversial." *Jean II* (J.A. 314).

opinion and order the district court to enter broad injunctive relief to remedy the invidious discrimination against petitioners.

Respectfully submitted,

BRUCE J. WINICK, ESQ.
American Civil Liberties Union
Foundation of Florida, Inc.
University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida 33124
(305) 284-2971

IRWIN P. STOTZKY, ESQ.
University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida 33124
(305) 284-2549

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
One New York Plaza
New York, New York 10004
(212) 820-800
By: ROBERT E. JUCEAM, ESQ.
TERRENCE A. CORRIGAN, ESQ.

/s/ IRA J. KURZBAN, ESQ.
National Emergency Civil
Liberties Committee and
Haitian Refugee Center, Inc.
KURZBAN, KURZBAN &
WEINGER, P.A.
Suite 901
700 Brickell Avenue
Miami, Florida 33131
(305) 371-0268

CHRISTOPHER KEITH HALL, ESQ.
32-32 32nd Street
Long Island City, NY 11106
(718) 204-5427

MICHAEL J. ROSEN, ESQ.
American Civil Liberties Union
Foundation of Florida, Inc.
19 West Flagler Street
Miami, Florida 33131
(305) 377-3736

AMICUS CURIAE

BRIEF

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No. 84-5240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL.,

Petitioners,

—against—

ALAN C. NELSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE*
LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS
IMMIGRATION CLINIC OF COLUMBIA UNIVERSITY SCHOOL OF LAW
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH
AMERICAN JEWISH CONGRESS
IN SUPPORT OF PETITIONERS

Counsel:
HARRIET RABB
LUCAS GUTTENTAG
JEFFREY P. SINENSKY
RUTI G. TEITEL
PHIL BAUM
LOIS C. WALDMAN

Of Counsel:
GLENN S. KOLLEENY
SCOTT HORTON
Attorneys for *Amici Curiae*

Counsel of Record:
ARTHUR C. HELTON
36 West 44th Street
New York, New York 10036
(212) 921-2160

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INTEREST OF AMICI

Amici curiae, the Lawyers Committee for International Human Rights, offer this brief in support of petitioners.

The Lawyers Committee for International Human Rights is a national legal resource center in the areas of refugee and asylum law. Since 1978, the Lawyers Committee has monitored proposed legislation and regulations in the refugee and asylum areas, has engaged in litigation in significant cases in these areas, and has assisted in providing legal representation for numerous applicants for political asylum in the United States from countries all over the world.

Along with other legal groups, the Lawyers Committee is assisting in the implementation of the final judgment in Louis v. Nelson, 544 F. Supp. 1004 (S.D.

Fla. 1982), by recruiting and training volunteer lawyers to represent the released Haitians in applying for political asylum in the United States. The Lawyers Committee is dedicated to ensuring that refugees and asylum-seekers receive just and equitable consideration under domestic and international law.

The Immigration Law Clinic of Columbia University School of Law, created in 1980, is an educational and service-providing center concerned with immigration and political asylum/refugee legal matters. The Columbia Law School faculty and students in the Clinic assist and represent persons otherwise financially unable to secure counsel. The Clinic is particularly concerned with the constitutional, civil rights and human rights implications of United States immigration and refugee policy and practice.

The Anti-Defamation League was organized in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL is vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under the law regardless of his or her race, religion or ethnic origins.

Since its inception in 1913, the ADL has espoused a principle against discrimination: "to secure justice and fair treatment for all." In keeping with this principle, ADL has intervened in numerous landmark cases, urging the unconstitutionality or illegality of racial practices, e.g., Brown v. Board of Education, 374 U.S. 483 (1954) and San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); and most recently in the

rehearing of the Japanese-American internment cases, Korematsu v. United States, No. CR-27635 (N.D. Cal. April 18, 1984).

In addition to the ADL's concern with combatting racial discrimination is its traditional interest in immigration policy -- to assure that immigration procedures adhere to basic standards of American justice and fairness, including respect for due process and fundamental human rights, regardless of race, creed, ancestry or national origin. It is these principles which are at issue in the present case.

The American Jewish Congress is an organization founded in 1918 to protect the rights of American Jews. One of its most important goals since then has been the creation of a fair and equitable immigration law which does not mask invidious discrimination in the form of differential treatment of aliens on the basis of race,

religion or national origin. In keeping with this policy the American Jewish Congress recently resolved that the Haitian refugees whose rights are at issue here should be paroled into this country while their applications for political asylum are pending.

SUMMARY OF ARGUMENT

All persons, including so-called "excludable" aliens, have recourse to the Fifth Amendment of the United States Constitution to redress governmental abuse, such as invidious discrimination. The Court has recognized this entitlement in several cases, and the decision in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), is distinguishable and no longer of continuing validity.

This case involves the discriminatory incarceration of Haitians. Such discrimination violates the Fifth Amendment. Incarceration, moreover, is an activity that is wholly unrelated to the immigration inspection and admission process. The discriminatory incarceration of the Haitians is, therefore, unconstitutional.

The discriminatory incarceration of the Haitians is also a violation of the Immigration and Nationality Act, which contemplates the exercise of the parole power in a non-discriminatory and individualized fashion. Such discrimination constitutes an abuse of administrative discretion.

Finally, principles of international law can be a source of interpretation for domestic law entitlements. In this case, the international legal prohibitions against discrimination and detention are particularly instructive. They confirm the constitutional and statutory violations in this case.

ARGUMENT

On February 28, 1984, the United States Court of Appeals for the Eleventh Circuit held that "[e]xcludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution." Jean v. Nelson, 727 F.2d 957, 984 (11th Cir. 1984) (en banc). This determination was made in the face of a prior finding by a unanimous panel of the Eleventh Circuit that officials of the Immigration and Naturalization Service ("INS") had purposefully discriminated against thousands of Haitians by incarcerating them for well over a year in various federal prisons and INS detention facilities. Jean v. Nelson, 711

F.2d 1455, 1487-1502 (11th Cir. 1983).[1] The broad and unprecedented rule of immunity announced by the Eleventh Circuit has no place under the Constitution. Governmental abuse of individuals, such as invidious discrimination on account of race and national origin, is not immune from constitutional review.

Although normally the statutory claims in a brief would be presented before the constitutional arguments, both the Eleventh Circuit and the parties themselves have argued the constitutional points first in this case; accordingly, the outline of this brief will follow the same pattern.

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[1] The Eleventh Circuit en banc accepted the "facts" of the case as set forth by the panel. 727 F.2d at 962. This brief also accepts the factual description of the panel regarding discrimination.

I.

Excludable Aliens Have Constitutional Rights.

This Court recently reiterated the long established principle that aliens, including aliens "illegally" present in this country, are protected by the Constitution's due process clause.

> Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.

Plyler v. Doe, 457 U.S. 202, 210 (1982) (emphasis added) (citations omitted). Indeed, Plyler emphasized that "the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." Id. (citations omitted).

Nonetheless, in finding itself unable to review an INS policy of dis-

criminatory detention specifically targeted against Haitian boat people, the Eleventh Circuit relied on an immigration law fiction that "excludable" aliens are not present in the United States[2] for the purpose of invoking constitutional rights. 727 F.2d at 969-71. It is important to recognize, however, that even the Eleventh Circuit does not contend that the fiction is absolute. 727 F.2d at 972-74. Thus, it concedes, as it must, that excludable aliens may not be punished without due process of law. Wong Wing v. United

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[2] When used in this brief the term "excludable" aliens is not meant to signify that plaintiffs' right to stay in this country has been finally determined. Indeed, upon release in 1982, the vast majority of the class members in Jean have applied for political asylum in the United States pursuant to 8 U.S.C. §§ 1101(a)(42)(A) and 1158, and those claims are in the process of being adjudicated administratively. See Helton, The Most Ambitious Pro Bono Ever Attempted, 12 Human Rights 18, 21, 46-48 (1984).

States, 163 U.S. 228, 238 (1896) (aliens, whether excludable or deportable, may not be criminally punished without due process of law); accord, Rodriguez Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981). See also United States v. Henry, 604 F.2d 908 (5th Cir. 1979) (Fifth Amendment entitles excludable alien to Miranda warning). See generally Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (protections of Fourteenth Amendment are not limited to citizens but "are universal in their application, to all persons within the territorial jurisdiction" of the United States).

Accordingly, there is only one possible answer to the question of whether excludable aliens are entitled to constitutional rights, and that answer must be that they are. Whether petitioners in this case are entitled to constitutional protection against discriminatory incar-

ceration depends on how far those rights extend. The Bill of Rights limits the power of government to act. Of relevance to this case, it provides that the federal government cannot deprive individuals of liberty on the basis of race and national origin. U.S. Const. Amend. V; see L. Henkin, Foreign Affairs and the Constitution 251-70 (1972). Petitioners, like all other persons, are entitled to these basic constitutional protections.

II.

The INS's Discriminatory Refusal to Consider Petitioners for Release on Parole Is Subject to Constitutional Scrutiny.

The Eleventh Circuit's holding is based on a primarily historical argument. The sovereign power to deny admission on the basis of national origin was upheld in The Chinese Exclusion Case, 130 U.S. 581 (1889). Somewhat more recently, this Court held in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544

(1950) (4-3 decision) that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

The principle established in The Chinese Exclusion Case and Knauff is not unlimited. Both cases involved efforts to compel the government to admit someone from abroad. Neither case is incompatible with the holding of Wong Wing, supra, that while the government's power to admit may be plenary, its treatment of aliens within American territorial limits is subject to constitutional constraints.

The Eleventh Circuit apparently does not dispute even this proposition. Rather, it cites Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), to support its claim that the power to engage in discriminatory and arbitrary detention is inherent in the power to regulate admission. 727 F.2d at 972.

There are, however, several significant differences between Mezei and this case. First, unlike this case, Mezei did not involve racial or national origin discrimination or the failure to accord individual release considerations on such grounds. Second, Mezei involved the denial of admission on national security grounds, which are not present here. Third, the Executive's action in Mezei was deemed consistent with a Congressional policy authorizing detention of security risks. By contrast, the Executive decision to incarcerate Haitian boat people violated the Congressional policy that the parole power be exercised in an individualized and non-discriminatory fashion.[3]

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[3] See Vigile v. Sava, 535 F. Supp. 1002, 1008 (S.D.N.Y. 1982), rev'd on other grounds sub nom. Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982) (INS district director testified that under statutory scheme "parole applications are given individual attention and are resolved on a case-by-case basis.").

Equally significant, Mezei was decided at a very different moment in our constitutional history. At the time of Mezei, the Supreme Court had not yet extended the protection of the Constitution to the mentally incompetent,[4] prisoners,[5] pretrial detainees,[6] children,[7] or residents of U.S. territories and possessions,[8] nor had the Constitution

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[4] Massey v. Moore, 348 U.S. 105, 108 (1954) (Under the Fourteenth Amendment, "[n]o trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.").

[5] Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (Although a prisoner's rights "may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. . . . They retain right of access to the courts. . . . Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. . . . Prisoners may also claim the protections of the

(Footnote continued)

Due Process Clause. They may not be deprived of life, liberty, or property without due process of law. (citations omitted)".)

[6] Bell v. Wolfish, 441 U.S. 520, 545 (1979) (Although their rights may be subject to necessary restrictions and limitations, "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that . . . are enjoyed by convicted prisoners.").

[7] In re Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the constitution and possess Constitutional rights," although the "State has somewhat broader authority to regulate the activities of children than of adults.").

[8] Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 600 (1976) ("It is clear now . . . that the protections accorded by either the Due

(Footnote continued)

been held to guarantee blacks the right to an integrated education.[9]

In addition, Mezei has been widely criticized as a historical anomaly ever since it was decided. A few months after Mezei was decided, Professor Henry M. Hart of Harvard Law School published a dialogue, now recognized as a classic in modern legal training, in which he labels the opinion an "aberration," not "intellectually respectable," and talks of its "brutal conclusions."

> [W]hen justices of the Supreme Court sit down and write opinions in behalf of tne Court which ignore the painful forward steps of a whole half century of

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Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.").

[9] Brown v. Board of Education, 347 U.S. 483, 495 (1954) (Due to segregated educational facilities, black children were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

> adjudication, making no effo: to relate what then is being done to what the Court has done before, they write without authority for the future. The appeal to principle is still open. . . .

Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts, 66 Harv. L. Rev. 1362, 1390-95, 1396 (1953). See also Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 20 (1984) (Mezei is cited as an example of "some of the most deplorable governmental conduct toward both aliens and American citizens ever recorded in the annals of the Supreme Court."); 2 K.C. Davis, Administrative Law § 11:5 at 358 (2d ed. 1979) ("widely c· ıdered to be one of the most shocking decisions the Court has ever rendered."); Note, 96 Harv. L. Rev. 1286, 1322 (1983) ("In advancing this language of absolute exclusion power, the Court deviated sharply from fifty years of doctrinal development."); and Martin, Due

Process and Membership in the National Community, 44 U. Pitt. L. Rev. 165, 173-80 (1983) (Along with Knauff, Mezei stands for a "rather scandalous doctrine.").

It should further be noted that both houses of Congress subsequently introduced bills to permit Mezei to enter the United States and that the Department of Justice eventually allowed Mezei to return to his home in Buffalo, New York. In the first edition of his treatise, Davis also reports that after the Department won the case, an "ad hoc committee was appointed, which took evidence and allowed Mezei a chance to know and to meet the evidence against him. The committee found that he was a member of the Communist Party, and as such legally excludable. But the committee nevertheless recommended that he be allowed to return to his home in Buffalo, and the Department followed the recommendation." Davis con-

cludes that the "Supreme Court may well be ashamed of the fact that the unnecessary injustice which it approved turned out to be too much even for the prosecutors to stomach." 1 K.C. Davis, Administrative Law § 7:15 at 482 and 511 (1958).

Mezei's precedential value must be judged from this historical perspective. To the extent Mezei is deemed to immunize from review the discriminatory behavior in this case, it should now be overruled. To do otherwise would be to hold that excludable aliens, including those who are seeking asylum from persecution, are not persons in contemplation of law, and may be incarcerated without recourse to basic due process of law.

It is important to recognize that this is not a case that concerns admissibility. The Eleventh Circuit's characterization of this case as an effort to litigate the constitutionality of peti-

tioners' admission fundamentally miscasts the issue before this Court. 727 F.2d at 971 and 972. Amici do not dispute that when Congress or the Executive establish standards regulating the eligibility for admission of aliens into this country, their power is plenary.

Petitioners have not made claims in this case about their admission, and they do not now seek a judicial determination of their eligibility for admission. Admissibility turns on the success of petitioners' individual claims for political asylum.[18] What is at issue before this

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[18] In order to be eligible for asylum, an alien must have been persecuted or have a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. §§ 1101(a)(42)(A), 1158(a). The question of whether the statutes and regulations which establish the substantive and procedural entitlement to asylum creates a constitutionally cognizable due process interest in the asylum adjudications
(Footnote continued)

Court is whether the government's blanket refusal to consider petitioners for parole constitutes a denial of equal protection as incorporated in the due process clause of the Fifth Amendment.

The Eleventh Circuit insists that the challenged detention policy is so entwined with an alien's application for admission that it is beyond constitutional scrutiny. 727 F.2d at 971 and 972. This position confuses the nature of parole and the fact that it bears no relation to admission. It also misapprehends the consequences that would result if constitutional standards were applied to the government's parole policy and practice.

In Leng May Ma v. Barber, 357 U.S. 185 (1958), this Court made clear that parole does not affect admissibility.

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is not involved in this case. Cf. Augustin v. Sava, 735 F.2d 32, 36-37 (2d Cir. 1984).

See also Landon v. Plasencia, 459 U.S. 21 (1982). The Court in Leng May Ma rejected an alien's claim that she was entitled to additional admission rights as a result of having been released on parole. The Court explained that "parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It [parole] was never intended to affect an alien's status . . . ." Id. at 190. Parole is a humanitarian act that has no effect on an alien's ultimate immigration status. A paroled alien is no less subject to exclusion, once the underlying admissibility question is decided, than is an alien who has remained in custody throughout the admissions decision process. An alien who has been detained and then paroled "'shall continue to be dealt with in the same manner as any other applicant for admission to the United

States.'" Id. at 188 (citation omitted)(emphasis in original). See also 8 U.S.C. § 1182(d)(5)(A) (parole "shall not be regarded as an admission of the alien and when the purposes of such parole shall have been served the alien shall forthwith return or be returned to the custody from which he was paroled. . .").

In addition, a paroled alien achieves no new immigration status by reason of his release. Parole does not lead to legal permanent residence or eligibility for citizenship. See 8 U.S.C. §§ 1101(a)(15), 1101(a)(16), 1151-1156, 1421-1427. Therefore, such an alien cannot confer any immigration benefits on others and cannot bring family members into the United States. See 8 U.S.C. § 1153. Furthermore, a paroled alien may not travel abroad without forfeiting his parole, and his status as a parolee does not confer upon him authorization to work

while he is in the United States. See 8 C.F.R. § 109 (1984).

The INS's parole decision is no more closely related to the admissions process than are other governmental actions applicable to excludable aliens, actions that must meet constitutional standards. For example, in United States v. Henry, 604 F.2d 908 (5th Cir. 1979), an alien was arrested at the Miami airport before he had been admitted into the country and was subsequently prosecuted for falsely representing himself to be a citizen (18 U.S.C. § 911) in order to gain entry to the United States. When the defendant claimed that he had not been given proper Miranda warnings, the government argued that an "excludable" alien did not have the same rights as other aliens due to "the Federal Government's right to exclude aliens and otherwise control and regulate their entrance into the country."

604 F.2d at 912 (footnote omitted). Although the very facts on which Mr. Henry was being prosecuted were also elements of his attempted illegal entry, the court rejected the government's argument that the Constitution should not apply simply because the defendant was an excludable alien.

Certainly, if the Constitution applies in the Henry context, where the facts at issue were directly related to Mr. Henry's admission, it also must apply to the parole process. The foundation for the Henry prosecution was directly related to admission, whereas an alien's entitlement to be considered for release on parole is not.

Indeed, if the parole process is held to be immune from constitutional attack, then virtually any aspect of government action applicable to excludable aliens would be likewise immune. For

example, the Eleventh Circuit's theory offers no principled basis for distinguishing between the discriminatory practice of not considering certain aliens for parole based on their race or national origin and a policy ordering that all such excludable aliens apprehended at the border be summarily executed, detained in inhumane conditions, or forced into involuntary servitude.

This view would insulate from scrutiny any conditions under which excludable aliens are detained. Excludable aliens in detention would not, under the Eleventh Circuit's rationale, have any constitutional right to be protected from governmental action denying them food, water, medical care or shelter fit for human habitation. Such a theory would permit the government to assert that conditions of confinement are "related" to the admission of the detainees and hence

unreviewable. A rationale that leads to such results must be rejected, and courts have consistently done so. United States v. Henry, supra; Rodriguez Fernandez v. Wilkinson, supra. See also Wong Wing v. United States, supra.

The government may not expand its plenary authority over those immigration issues related to admission to insulate from constitutional review any governmental action affecting excludable aliens merely because the government unilaterally characterizes it as "regarding admission." Parole is not so closely related to admission so as to cloak the former with the immunity afforded the latter.

Furthermore, the principle that an alien is entitled to be considered for parole on a non-discriminatory, individualized basis will not diminish the government's authority to detain those indi-

viduals who are likely to abscond. See Leng May Ma v. Barber, supra. Blanket parole is no more required than blanket detention is permissible. Parole is an act of discretion that is to be exercised on a case-by-case basis pursuant to statutory standards, yet the petitioners in this case were treated as part of an undifferentiated mass and imprisoned accordingly.

Congress, in addition, has made clear its intention that parole decisions for excludable aliens be based on neutral and non-discriminatory criteria bearing on each alien's application. The parole statute itself is written in universal terms, referring to "any alien". 8 U.S.C. § 1182(d)(5)(A). Any ambiguity in the statutory language regarding parole, moreover, must be interpreted in light of the unambiguous history of Congressional efforts to remove the lingering vestiges of

discrimination in the immigration law. Specifically, in 1965 Congress eliminated the last remaining admission quotas based on national origin. See Pub. L. No. 89-236, 79 Stat. 911 (1965), codified in 8 U.S.C. § 1101 et seq. Thus, the implementation of a Congressionally mandated, non-discriminatory parole policy cannot undermine this country's immigration authority.

III.

The Violation of Petitioners' Statutory Entitlement to Individualized and Non-Discriminatory Consideration for Parole Is an Abuse of Discretion

Apart from the constitutional issue, the en banc court erred in its discussion of abuse of discretion. As demonstrated previously, the parole provisions under which petitioners were entitled to consideration are facially neutral. Neither nationality nor race is featured as a criterion in the provision.

The discretion of the INS in the parole area is limited by the basic prin-

ciple that its actions may not be "arbitrary, capricious and an abuse of discretion . . . ." 5 U.S.C. § 706(2)(A). In a highly regarded opinion,[11] "Judge Friendly, writing for the Second Circuit Court of Appeals, held that a refusal by INS to suspend the deportation of an alien was reviewable for abuse of discretion and set forth an explanation of the abuse of discretion standard:

> Without essaying comprehensive definition, we think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis, such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress could not have intended to make relevant."

Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (emphasis added). See also

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[11] See e.g. 5 K.C. Davis, Administrative Law 28:7 at 288(2d ed. 1984).

Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982).

Invidious dicrimination constitutes an abuse of discretion; so does an inexplicable departure from a statutorily imposed, facially neutral standard. In this case, the record of discrimination and departure from the standard is ample, and a remand would serve no useful purpose.

In adopting a "facially legitimate and bona fide reason" test for denying parole, the Eleventh Circuit, 727 F.2d at 977, ignored the well developed approach to abuse of discretion under the Administrative Procedures Act. Moreover, the test is borrowed inappropriately from an admissions case: Kleindienst v. Mandel, 408 U.S. 753, 770 (1972), which involved the propriety of a denial of a waiver by the Attorney General under the congressionally imposed ideological exclu-

sions provision of the immigration law. In this case, unlike in Kleindienst, the actions of subordinate agency officials are involved, rather than those of the Attorney General and Congress. Moreover, as shown before, release on parole is unrelated to admission into the United States. In addition, the "facially legitimate and bona fide reason" test cannot be utilized to provide a pretext for discimination.

Rather than reaching the constitutional issue, this case could be resolved on the ground that respondents abused their discretion by discriminatorily refusing to consider petitioners for release on parole. In the event that this court finds it necessary to address the en banc court's analysis of abuse of discretion, it should accordingly reject the facially legitimate and bona fide reason standard in favor of the more

traditional approach in administrative law to measure abuse of discretion. See Wong Wing Hang, supra.

IV.

Respondents' Discriminatory Parole Practice Violated Standards of International Law Which Inform the Interpretation of Domestic Law.

A. Customary International Law

The government's discriminatory refusal to consider parole, resulting in over a year of incarceration for the petitioners, also violates established principles of international law. In Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787, 800 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981), the District Court held that the extended, indefinite confinement in federal prison of an excludable Cuban national, who had arrived in the United States in June 1980 and who could not be deported in the foreseeable future, violated customary international law. In finding the pertinent rule of customary

international law, the court referred to several international instruments, including the Universal Declaration of Human Rights, the American Convention on Human Rights, and the International Covenant on Civil and Political Rights. The District Court determined that indefinite, arbitrary detention violated customary international law and issued a writ of habeas corpus to remedy the continued unlawful detention. Rodriguez Fernandez v. Wilkinson, supra, 505 F. Supp. at 798-800.

On appeal, the Tenth Circuit affirmed, viewing principles of international law as an appropriate reference for construing American law.

> It seems proper then to consider international law principles for notions of fairness as to [the] propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment. See Universal Declaration of Human Rights, Arts. 3 and 9, U.N. Doc. A/801 (1948); The American Convention on Human Rights, Part I, ch. II., Art. 7, 77 Dept. of State Bull. 28 (July 4, 1977).

Rodriguez Fernandez v. Wilkinson, supra, 654 F.2d at 1388. See also Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 n.19 (N.D. Ga. 1981).

These court decisions have been confirmed in a recent codification of the pertinent international law rules. See Restatement of Foreign Relations (Revised) § 702 (Tent. Draft No. 3, 1982) (hereinafter "Restatement"). It is now beyond peradventure that customary international law prohibits prolonged arbitrary detention. The Restatement specifically provides:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention . . . .

Restatement § 702(e).[12] As to prolonged arbitrary detention, the comment to Section 702 provides:

> Detention is arbitrary if it is not pursuant to law, but may also be arbitrary if "it is incompatible with the principles of justice or with the dignity of the human person" . . . . Detention is arbitrary if it is supported only by a general warrant, or is not accompanied by a notice of charges . . . . A single, brief, arbitrary detention would violate provisions of the principal international agreements; arbitrary detention violates customary law if it is prolonged and practiced as state policy.

Id., comment g (citation omitted).

In this case, the detention of the Haitians was clearly prolonged, for many well over one year. It was, more importantly, arbitrary. It was not possible for the Haitians to be considered for release irrespective of the individual circumstances of their cases. The INS simply asserted the power to imprison indefinitely, and the only apparent justification was one of administrative convenience. Detention under such circumstances, however, violates customary international law. It is appropriate in this case "to consider international law principles for notions of fairness". See Restatement § 134.

[12] The Reporter's Notes to Section 702 emphasize that "[a]rbitrary detention is cited as a violation of international law in all comprehensive international human rights instruments . . . ." Note 6.

B. The Protocol Relating to the Status of Refugees

The fact that many of the detained Haitians applied for political asylum in the United States provides an additional international law referent. In 1968 the United States acceded to the United Nations Protocol Relating to the Status or Refugees, 19 U.S.T. 6223; T.I.A.S. No. 6577; 606 U.N.T.S. 267. The Protocol prohibits discrimination (Article

3) and the imposition of penalties (Article 31(1)) against refugees, as well as unnecessary restrictions upon their movements (Article 31(2)).[13]

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[13] Subdivision 2 of Article 31 of the Protocol clearly applies to a person who is in the process of having his or her status as a "refugee" adjudicated. The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees (Geneva 1979) (the "Handbook") of the United Nations High Commissioner for Refugees is the principal international referent for the interpretation of the Protocol. Indeed, the Board of Immigration Appeals itself has cited the provisions of the Handbook as persuasive authority in the analysis of asylum claims. In re Frentescu, 18 I&N Dec. 244, 246 (B.I.A. 1982); In re Rodriguez-Palma, 17 I&N Dec. 465, 468 (B.I.A. 1980). The Handbook makes it clear at paragraph 28 that "a person is a refugee within the meaning of the 1951 Convention [and the Protocol] as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."

In this case, the detention of the Haitians whose asylum applications were pending constitute "discrimination" as well as a "penalty" and unnecessary "restriction" on their movement. There had been no particularized showing of a threat to national security or that, if released, the aliens would abscond. See Leng May Ma v. Barber, supra, 357 U.S. at 190. The constitutional claims in this matter should therefore be resolved in a fashion consistent with this country's obligations under the Protocol.[14]

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[14] The question of whether the Protocol is a self-executing treaty need not be reached in this case since the Protocol (as well as customary international law) should be looked to as a source to interpret domestic law and confirm the constitutional claims. See Rodriguez Fernandez v. Wilkinson, supra.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: New York, New York
January 17, 1985

Respectfully submitted,[18]

Counsel:
Harriet Rabb
Lucas Guttentag
Jeffrey P. Sinensky
Ruti G. Teitel
Phil Baum
Lois C. Waldman

Of Counsel:
Glenn S. Kolleeny
Scott Horton

Counsel of Record:
Arthur C. Helton
36 West 44th Street
New York, N.Y. 10036
(212) 921-2160

---

[18] Counsel wish to acknowledge the assistance of Rhonda L. Brauer, law clerk, in the preparation of this brief.

AMICUS CURIAE

BRIEF

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No. 84-5240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, *et al.*,
Petitioners,

v.

ALAN NELSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS' HAITIAN REFUGEE AND CARIBBEAN TASK FORCES AND OF THE CONGRESSIONAL HISPANIC CAUCUS, THE CHAIRMAN OF THE CONGRESSIONAL BLACK CAUCUS, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF PETITIONERS

RODERIC V. O. BOGGS
CAROLYN WALLER
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Of Counsel

ROBERT H. KAPP *
DAVID W. BURGETT
PATRICK B. FAZZONE
JONATHAN L. ABRAM
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4072
(202) 331-4597
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether intentional and invidious discrimination by federal officials, in incarcerating black Haitian refugees in prisons and detention camps on the basis of their race and national origin, is wholly immune from constitutional scrutiny under the equal protection guarantee of the Fifth Amendment.

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INTEREST OF *AMICI*

This brief is submitted on behalf of the National Association for the Advancement of Colored People, Inc. (NAACP); the National Conference of Black Lawyers (NCBL); the Southern Christian Leadership Conference (SCLC); the Mexican American Legal Defense and Educational Fund (MALDEF); the following Members of Congress, who are members of the Haitian Refugee Task Force of the Congressional Black Caucus—Rep. Walter E. Fauntroy (Task Force Chairman), Rep. Julian C. Dixon, Rep. George W. Crockett, Jr., Rep. Major R.

Owens, and Rep. Edolphus Towns; Rep. Mervin M. Dymally, Chairman of the Caribbean Task Force of the Caucus; Rep. Mickey Leland, Caucus Chairman; and Rep. Robert Garcia, a member of the Congressional Hispanic Caucus.

The NAACP is a non-profit corporation serving approximately 500,000 members nationwide, whose objectives include the achievement of equal rights and the elimination of racial discrimination. The NCBL is a non-profit national membership organization comprised of black attorneys, among whose goals is the elimination of invidious discrimination from law and public policy. SCLC is a non-profit membership organization dedicated to the achievement and protection of civil rights for all minorities. MALDEF is a national hispanic civil rights organization whose principal objective is to protect the rights of hispanics, both documented and undocumented, through litigation and advocacy. The NAACP, NCBL, SCLC, and MALDEF are interested in this case because of the effects of invidious discrimination on black Haitians, and because the decision below also threatens minority citizens and aliens by eroding the principle that the Constitution universally condemns invidious race and national origin discrimination.

The congressional *amici* are concerned with eliminating discriminatory immigration practices aimed at Haitians and hispanics, many of whom have sought refuge in their districts. As Members of Congress, these *amici* have a compelling interest in the availability of judicial review to ensure that executive agencies implement legislation, including the immigration laws, consistently with the Constitution. Their interest is particularly compelling where, as in this case, federal personnel contravened legislative policy condemning the use of racial criteria in the immigration context.[1]

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[1] The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 36.1.

STATEMENT OF THE CASE

This Court granted certiorari to review the unprecedented holding of the Court of Appeals for the Eleventh Circuit in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*),[2] that invidious discrimination by Immigration and Naturalization Service (INS) functionaries in the incarceration of Haitian refugees is wholly beyond constitutional scrutiny.

Petitioners are black Haitian refugees who have come to the United States since May 20, 1981 to seek political asylum, often at great risk to their lives. Upon their arrival, INS personnel intentionally discriminated against them on the basis of their race and nationality by singling them out from other admission applicants for prolonged incarceration in remote federal prisons and detention camps. *Jean v. Nelson*, 711 F.2d 1455, 1501 (11th Cir. 1983) (P.A. A35), *reheard en banc*, 727 F.2d 957 (11th Cir. 1984) (P.A. A1).[3] The evidence of intentional discrimination in the incarceration of black Haitians was largely unrebutted, except by the government's "mere protestation." P.A. A73. A "plethora" of evidence showed that INS personnel specifically targeted Haitians for detention. P.A. A70. Statistical evidence disclosed a stark pattern of race and national origin discrimination. P.A. A69. INS functionaries' detention decisions had a "vastly disproportionate impact on Haitians, as opposed

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[2] Appendix to Petition for Writ of Certiorari (P.A.) A1.

[3] Upon rehearing *en banc*, the court adopted the facts as stated in the trial court and panel opinions. P.A. A6. Implicitly concurring in the panel opinion's premise that the evidence establishes intentional discrimination, the court proceeded to decide "[t]he central question raised by this case in its present posture": "whether the Haitian plaintiffs may invoke the equal protection guarantee" with respect to the denial of release from detention. *Id.* The court answered that question in the negative, and remanded for findings on the narrower factual issue of the existence of a "facially legitimate and bona fide reason" for parole denial. P.A. A22. Accordingly, the validity of the constitutional ruling must be assessed on the premise of invidious INS discrimination.

to non-Haitian, immigrants." P.A. A67. Uncontradicted evidence demonstrated that INS agents granted parole[4] (*i.e.*, release pending an exclusion hearing) or deferred inspection to a far larger percentage of non-Haitians than Haitians. *Louis v. Nelson*, 544 F. Supp. 973, 982 (S.D. Fla. 1982) (P.A. A93, A102). For example, data from INS District VI indicated that, whereas 35 percent of non-Haitians seeking entry but not promptly admitted or transferred[5] from August 1 to November 1, 1981 were paroled on the day of arrival, all 1143 Haitians were detained. Plaintiffs' Exhibit (Ex.) 191 (chart 3); R. v.53, p. 2951; R. 2986. Data concerning persons whose admissibility was preliminarily challenged upon arrival at Miami's airport showed that over 96 percent of non-Haitians were paroled or granted deferred inspection, compared with only two-thirds of the Haitians. Ex. 187 (chart 2); R. v.53, pp. 2876, 2920. Expert statistical testimony described the likelihood of such disparity occurring by chance as "far less than one in ten billion," and "a statistical joke." P.A. A68; R. v.53, pp. 2949-50. Yet the government failed to explain what factors parole decisions were based on, and in fact petitioners presented neither a national security threat nor a risk of absconding.[6] P.A. A77; *Louis v. Nelson*, 544 F. Supp. 1004, 1006 (S.D. Fla. 1982) (P.A. A125, A127).

Unrebutted evidence also established invidious discrimination in the treatment of Haitians after initial

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[4] The Attorney General has authority to release ("parole") aliens pending exclusion hearings under 8 U.S.C. § 1182(d)(5) (1982).

[5] This comparison excludes persons transferred to the custody of the Drug Enforcement Administration or U.S. Marshal.

[6] Since 1954, the Attorney General applied a uniform policy of granting parole to all who sought it, except where there was a demonstrable threat to national security or risk of absconding. That policy avoided "needless confinement" and "reflect[ed] the human qualities of an enlightened civilization." *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958). However, the policy was abandoned in 1982.

detention. Haitians generally were detained for unusually prolonged periods, sometimes for more than a year. P.A. A43. Unlike almost all aliens of any other nationality or race, Haitians were separated from other family members. P.A. A101-02 n.24. Many fathers and mothers were separated from their minor children through transfers or by being retained in custody after release of their children. *Id.* Also unlike aliens of other nationalities or races, petitioners were shipped to remote detention centers in what the district court described as a "human shell game." *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981) (P.A. A144, A146). The camps were located in "desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any Creole interpreters." *Id.* At many camps, medical facilities were inadequate and immigration counsel were unavailable.[7] Petitioners were confined to substandard facilities or otherwise subjected to conditions considerably harsher than those faced by most non-Haitian detainees.[8] Some were physically abused or deprived of necessary medical care.[9]

INS functionaries' repeated departures from normal procedures when dealing with Haitians further evidenced discriminatory intent.[10] Upon arrival, Haitians, including mothers and children, were left to await processing in the hot Florida sun for hours when no INS officials were present to process them. R. v.44, p. 1385. In contrast, Cuban refugees were taken inside to wait and were given numbers. *Id.* Unlike any other aliens, Haitians

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[7] R. v.45, p. 1258.

[8] R. v.42, pp. 918-919; P.A. A70-71.

[9] R. v.43, pp. 1224, 1251, 1258.

[10] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court indicated that "government departures from the normal procedural sequence might afford evidence that improper purposes are playing a role." *Id.* at 268.

were subjected to mass exclusion hearings without adequate translation. These hearings were held in locked courtrooms from which *pro bono* counsel were barred.[11] In other instances, the INS prevented counsel from representing their clients by scheduling simultaneous appearances in multiple courtrooms. INS officials also departed from normal procedures by serving Haitians with hearing notices before they could present asylum claims to the INS district director. P.A. A72. This procedure effectively prevented Haitians from seeking asylum administratively.[12]

The discriminatory treatment by INS functionaries occurred in the context of a clear historical pattern of discrimination against other Haitian refugees, which includes the discriminatory denial of parole.[13] Haitian refugees also have been improperly denied their statutory right to a hearing before an immigration judge on their claims for political asylum.[14] They have been denied the right to work during the pendency of such claims.[15] Information supporting such claims has been withheld.[16] Even the fundamental right to full, fair, and nondiscriminatory consideration of asylum claims has been denied.[17]

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[11] P.A. A72; P.A. A146-147; R. v.45, pp. 1596-1598.

[12] Once the alien is served with a notice of an exclusion hearing, known as an "I-122," there may be no further "extra-judicial" contact between the INS and the alien. *See* P.A. A72 n.40.

[13] *Bertrand v. Sava*, 535 F. Supp. 1020 (S.D.N.Y. 1982); *Vigile v. Sava*, 535 F. Supp. 1002 (S.D.N.Y. 1982).

[14] *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated as moot*, 566 F.2d 104 (5th Cir. 1978).

[15] *National Council of Churches v. Egan*, No. 79-2959-CIV-WMH (S.D. Fla. 1979).

[16] *National Council of Churches v. Immigration and Naturalization Service*, No. 78-5163-CIV-JLK (S.D. Fla. 1979).

[17] *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as mod'd sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (11th Cir. 1982).

Petitioners filed a *habeas corpus* petition and civil action challenging *inter alia* the pattern of invidious discrimination with respect to incarceration.[18] The district court held that the Fifth Amendment protects petitioners with respect to their incarceration and found that the INS detention practices had a harsher impact on Haitians than any other group. However, it concluded that there was insufficient proof of discriminatory intent. P.A. A120-22.

The Eleventh Circuit reversed, holding the finding of lack of proof of discriminatory intent to be "clearly erroneous." P.A. A72. It observed that the unrebutted statistical evidence showed a "pattern [of discrimination] as stark as that in *Gomillion* [*v. Lightfoot*, 314 U.S. 339 (1960)] or *Yick Wo* [*v. Hopkins*, 118 U.S. 356 (1886)]." P.A. A69. Petitioners' other evidence demonstrated "circumstantially, and to an extent, directly, intentional government discrimination against Haitians." P.A. A74. Accordingly, the court ruled that the equal protection guarantee of the Fifth Amendment was violated. P.A. A81-82.

On rehearing *en banc*, the court did not question the panel's conclusion that petitioners had been subjected to intentional invidious discrimination. Accordingly, it proceeded to the constitutional issue, holding that invidious discrimination was of no constitutional consequence because the Constitution places no restrictions whatsoever on the government's incarceration of an alien pending a hearing on admission. P.A. A19.

SUMMARY OF ARGUMENT

No principle is more fundamental to our nation's values than that the Constitution condemns invidious governmental discrimination. The holding that the government could incarcerate a person on the basis of his

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[18] Although petitioners also raised other claims, the decision below and the issue before this Court concern only invidious discrimination with respect to incarceration.

race or national origin, free from any constitutional scrutiny, is without precedent since the Dred Scott decision. If the decision is allowed to stand, petitioners and persons of other disfavored races or nationalities seeking admission to this country could be held in prolonged confinement that would constitute a gross violation of constitutional rights if inflicted on citizens, or even on aliens who had entered the country illegally. Accordingly, the holding below not only has a devastating effect on black Haitian refugees, but grave implications for all aliens seeking admission and for the integrity of the equal protection principle at issue.

This Court has clearly established that excludable aliens are persons within the meaning of the Fifth Amendment. Accordingly, aliens are guaranteed equal protection. The Fifth Amendment applies whether the person deprived of liberty is inside the country, outside it, or "at the border," as petitioners are deemed to be. In particular, constitutional protections apply to actions taken pursuant to the Attorney General's authority to parole excludable aliens.

The Eleventh Circuit's theory that the entry doctrine immunizes discriminatory incarceration from review is without precedent or merit. The entry doctrine holds that aliens not previously admitted to the country have no constitutional rights with respect to their admission. It has never been applied to incarceration, and its rationale is inapplicable in that context. In this case, petitioners assert no rights with respect to admission or admission procedures. They claim only the right to be free from discriminatory incarceration. Recognition of that right will not affect their rights with respect to admission, nor the authorities' ability to regulate admission.

The lower court's theory that the preadmission incarceration decision is an "integral part" of the exclusion process, and that this places discriminatory incarceration beyond the Constitution's reach, suffers from at

least four fatal flaws. First, the fact that the general authority to incarcerate can serve some of the same policies as exclusion is irrelevant, since petitioners do not challenge incarceration in general, but only the use of race and nationality criteria. Decisions of this and other courts demonstrate that an "integral" relation to admission of the kind relied on below does not obliterate constitutional protections. Second, this Court's decisions demonstrate that even an integral, functional relationship between the specific conduct challenged as unconstitutional and an objective established pursuant to plenary congressional and executive authority would not remove the conduct from constitutional scrutiny. Third, since discriminatory preadmission incarceration not only furthers no admissions policy or procedure, but is directly contrary to express statutory and executive mandates, there is in fact no cognizable relationship whatsoever, much less an "integral" one. Finally, it follows from the ruling below that *no* practice relating to exclusion, including the sinking of boatloads of refugees, would be subject to constitutional review. That cannot be the meaning of the Constitution or this Court's cases. Accordingly, the decision below cannot stand.

ARGUMENT

I. THE RULING THAT THE GOVERNMENT'S DEPRIVATION OF A PERSON'S PHYSICAL LIBERTY ON THE BASIS OF HIS RACE OR NATIONAL ORIGIN IS IMMUNE FROM CONSTITUTIONAL SCRUTINY IS WITHOUT PRECEDENT SINCE THE ADOPTION OF THE EQUAL PROTECTION GUARANTEE.

There is no more firmly established principle than the Constitution's condemnation of invidious governmental race and national origin discrimination.[19] That principle is embodied in the Due Process Clause of the Fifth Amendment, which prohibits the federal government

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[19] *See, e.g., Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

from denying any person the equal protection of the laws. Under this provision, classifications based on race or national origin are constitutionally suspect, and "[a]ll legal restrictions which curtail the civil rights of a single racial group [are subject] to the most rigid scrutiny. . . ." *Korematsu v. United States*, 323 U.S. 214, 216 (1944).[20]

Not since the Dred Scott decision[21] has this Court indicated under any circumstances that the government could deprive a person of physical liberty on the basis of his race or national origin, wholly free from constitutional scrutiny. That decision, which held that slaves could not invoke the protection of the Constitution, was overruled by the adoption of the Fourteenth Amendment. Since that time, not a single decision of any court has held that the invidiously discriminatory incarceration of a person was immune from all constitutional scrutiny—until the decision below. Indeed, it appears that neither this Court nor any other court has held invidious race or national origin discrimination to be immune from constitutional scrutiny when impinging on *any* kind of interest, except the interest in being admitted to the country, which is not at stake here.[22]

The impact of this unprecedented decision is devastating. In the absence of classwide injunctive relief[23]

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[20] Congress also has mandated that the immigration laws be administered in a nondiscriminatory manner. In 1965, it abolished the national origin quota system and special immigration restrictions relating to orientals, and forbade discrimination based on race, sex, nationality, place of birth, or place of residence in all immigration matters. Act of Oct. 3, 1965, P.L. 89-236, 76 Stat. 911; 8 U.S.C. § 1152(a) (1982).

[21] *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

[22] *See* Section III.A, pp. 18-22 *infra*.

[23] The limited nonconstitutional relief granted below, which only requires the INS to state after the fact a valid reason for its

against discriminatory incarceration practices, petitioners who currently are incarcerated could be subjected to further discriminatory practices, and those temporarily paroled since the inception of this litigation could be incarcerated once again on a discriminatory basis. If the holding is allowed to stand, unauthorized discrimination like that evidenced in this case could also be visited on non-Haitian blacks or persons of other disfavored races and nationalities, free from constitutional scrutiny. The significance of the holding will be still greater if prejudice reappears in official policy. The prospect is not fanciful; until 1965, Congress and the Executive maintained an official system of discriminatory national origin quotas. They also maintained special restrictions that prevented orientals from immigrating in the same numbers as people of other races and nationalities.[24] At times like the present, when many citizens blame unemployment and social ills on foreigners, both official and informal governmental discrimination are particularly likely to arise and be tolerated.

The import of the decision below extends beyond the treatment of aliens, undermining fundamental constitutional values that should be precious to everyone. It erodes the principle that the Constitution establishes universal limits, applicable regardless of the identity or status of the government's victims.[25] It also undercuts the principle that race and national origin classifications

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actions, notwithstanding the possible existence of discriminatory reasons, applies only to a part of the class. *See* P.A. A22.

[24] *See, e.g., The Chinese Exclusion Case*, 130 U.S. 581 (1889). These restrictions were abolished by the Act of October 3, 1965, P.L. 89-236, 76 Stat. 911; 8 U.S.C. § 1152(a) (1982).

[25] While the legal status of an incarcerated person sometimes affects the *application* of his constitutional rights, it has no bearing on the *applicability* of those rights. *E.g., Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (convicted prisoner retains constitutional rights, including equal protection, although the protection afforded by such rights "may be diminished").

are constitutionally suspect, *see* pp. 9-10 *supra*, by carving out an unprecedented exception in which a person may be subjected to discriminatory incarceration. For all these reasons, *amici*, who share an interest in the eradication of discrimination and a particular concern with the plight of Haitian refugees, regard the decision below as a grave development that must not be tolerated.

II. THE FIFTH AMENDMENT REQUIRES EQUAL PROTECTION WHENEVER THE FEDERAL GOVERNMENT DEPRIVES A PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT REGARD TO THE VICTIM'S CITIZENSHIP OR WHETHER HE HAD "ENTERED" THE UNITED STATES AT THE TIME OF THE DEPRIVATION.

The Eleventh Circuit's holding that the incarceration of excludable black Haitian refugees is beyond constitutional scrutiny is fundamentally at odds with the principle that "[t]he Constitution of the United States . . . covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120-121 (1866). No circumstance of this case—including the nature of the governmental action, the citizenship of its victims, and the fact that petitioners had not been officially "admitted" to the country at the time of the action—justifies a departure from that basic principle.

The Fifth and the Fourteenth Amendments require that the government afford due process, including equal protection, whenever it deprives a person of "life, liberty, or property." U.S. Const., Amend. V & XIV, § 1. Accordingly, elementary constitutional doctrine dictates that incarceration in federal detention camps on the basis of race and national origin is a deprivation of liberty requiring review. *Korematsu*, 323 U.S. at 216 (detention of Japanese Americans in "relocation centers").

This constitutional protection applies regardless of the victim's citizenship. "Whatever his status under the immigration laws, an alien is surely a 'person' . . . [protected by the Due Process Clauses of the Fifth and Fourteenth Amendments]." *Plyler v. Doe*, 457 U.S. 202, 212 (1982). *Accord*, *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In particular, this Court has long held that aliens are entitled to equal protection under both amendments. In *Yick Wo*, the Court held that discrimination against Chinese resident aliens in the application of a facially-neutral laundry licensing regulation violated their equal protection rights. "The rights of petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China." *Id.* at 368. The Court subsequently held that aliens residing outside the United States were entitled to just compensation under the Fifth Amendment when their property was seized by the federal government. *Russian Volunteer Fleet*, 282 U.S. at 489. In *Plyler*, 457 U.S. at 212, the Court reiterated the long-standing principle that aliens, even if undocumented, are protected by the Fifth Amendment from invidious discrimination by the federal government.[26]

Numerous decisions recognize that governmental incarceration of aliens is subject to constitutional scrutiny. In *Wong Wing v. United States*, 163 U.S. 228 (1896), this Court reviewed and struck down a statute authorizing administrative officials to imprison Chinese nationals found to be in this country illegally. *Id.* at 238. The Court acknowledged "that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory. . . ." *Id.* at 237. However, the Court held that,

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[26] *See also Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420-21 (1948); *Truax v. Raich*, 239 U.S. 33, 39 (1915); *United States v. Wong Kim Ark*, 169 U.S. 649, 695 (1898).

notwithstanding this broad authority over admission, the government may not incarcerate aliens without affording them Fifth Amendment protections:

> [W]hen Congress sees fit to promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. [*Id.*]

The Tenth Circuit has held that due process protections are applicable "when imprisonment [of an alien facing exclusion] is for an indefinite period, continued beyond reasonable efforts to expel the alien." *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981). Rodriguez-Fernandez was an excludable alien who challenged his prolonged incarceration by the INS pending deportation. The court acknowledged that continued incarceration "in a federal prison of one who has been neither charged nor convicted of a criminal offense is a deprivation of liberty in violation of the Fifth Amendment. . . ." *Id.* at 1387. Noting that Congress could not deprive him of his property without just compensation, or order him killed because his country would not accept him back, the court held that he could not be incarcerated "without being accorded the substantive and procedural due process guarantees of the Fifth Amendment." *Id.* His status as an excludable alien in no way affected his constitutional entitlement to those Fifth Amendment guarantees. *Id.* at 1387 n.3. *Accord, Diaz v. Haig*, 594 F. Supp. 1, 7-8 (D. Wyo. 1981).

Nor does the location of the deprivation of liberty affect the applicability of constitutional protections. Except with respect to their exclusion, aliens have the benefit of their constitutional rights regardless of whether they have entered the United States.[27] This Court has

[27] A narrow exception applies where the interest at stake is merely the privilege of being admitted to the country, in which case constitutional restrictions are inapplicable to those who have not already effected an "entry." *See* Section III.A, pp. 18-22 *infra*. The entry fiction provides that, for purposes of determining admissibility, persons detained upon arrival are deemed not to have "entered" the United States, even though they are physically present in the country. Deprivations of physical liberty not entailed in an exclusion order, however, fall within the general rule rather than the limited exception.

applied constitutional protections to persons deprived of liberty outside the country or "at the border," as well as to those in the interior. As the Court stated in *Balzac v. Porto Rico*, 258 U.S. 298 (1922), the Constitution of the United States is in force "wherever and whenever the sovereign power of that government is exerted." *Id.* at 312-13. Accordingly, the guarantees of "certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law," protect non-citizens in the Philippines and Puerto Rico. *Id.* The Court subsequently held that aliens residing outside the United States were entitled to just compensation under the Fifth Amendment when their property was seized. *Russian Volunteer Fleet*, 282 U.S. at 481-82. In *Reid v. Covert*, 354 U.S. 1 (1957), a four-member plurality of the Court reiterated that the Constitution, and the Fifth Amendment in particular, are "all-inclusive" and designed to "restrict the United States Government when it acts outside of this country, as well as here at home." *Id.* at 7-8.

In accord with this Court's decisions, the lower courts consistently have applied constitutional protections, including the Fifth Amendment, to shield aliens against acts occurring outside the country. In *United States v. Demanett*, 629 F.2d 862 (3d Cir. 1980), *cert. denied*, 450 U.S. 910 (1981), for example, the Third Circuit held that an alien was protected from an unreasonable search that occurred outside the United States. The Second Circuit has held that the Constitution guarantees aliens due

process, as well as freedom from unreasonable searches, with respect to the actions of the U.S. government abroad. *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974).[28] Similarly, in *United States v. Tiede*, 86 F.R.D. 227, 244, 260 (U.S. Ct. for Berlin 1979), the court held that constitutional procedural rights, including the Fifth Amendment due process guarantee, apply in a criminal trial of aliens conducted overseas by a United States court. In so holding, the court strongly suggested that any action by U.S. authorities in the U.S. sector of Berlin, whether affecting U.S. citizens or others, would be subject to constitutional limits. *Id.* at 242-44.

Aliens stopped at the border by immigration officials are also protected by the Fifth Amendment, even though they have not "entered" the country. In *United States v. Henry*, 604 F.2d 908 (5th Cir. 1979), the Fifth Circuit held that an alien not yet admitted had the Fifth Amendment privilege against self-incrimination when questioned upon arrival by INS officials. While the court acknowledged the Executive's broad authority to regulate the admission of aliens, that power did not diminish Fifth Amendment protections where a deprivation of liberty as a result of a criminal conviction might ensue, even though the constitutional infringement occurred "at the border." *Id.* at 914-915. *See also United States v. Casimiro-Benitez*, 533 F.2d 1121 (9th Cir.), *cert. denied*, 429 U.S. 926 (1976).[29]

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[28] Toscanino, an Italian national, was subjected to warrantless wiretapping abroad, kidnapped, and forcibly brought to the United States by federal agents. The government argued that the protections of the Constitution are not available to aliens victimized by U.S. government action outside the United States. The Court rejected the government's contention, holding that the Fifth and Fourth Amendments "refe[r] to and protec[t] 'people' rather than 'areas' . . . or citizens. . . ." 500 F.2d at 280.

[29] Cases in which there was no occasion for a direct holding have also strongly suggested that constitutional protections apply to aliens seeking parole from incarceration by the INS. In *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982), the court stated that the Fifth Amendment "arguably forbids the INS from discriminating against the petitioners on the basis of race or national origin" in determining whether to incarcerate or parole unadmitted aliens. The court did not so hold, however, because the aliens relied only on their allegations of abuse of discretion. *Id.* at 207 n.6.

In addition to the trial court and court of appeals below, two federal courts have addressed the issue now presented. Both held that involuntary detention of excludable aliens resulting from the exercise of the government's discretionary parole authority prior to a determination on admission is subject to the strictures of the Fifth Amendment. *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975); *Fernandez-Roque v. Smith*, 567 F. Supp. 1115 (N.D. Ga. 1983), *rev'd*, 734 F.2d 576 (11th Cir. 1984). *Nguyen Da Yen* arose from the "Saigon Babylift," in which Vietnamese children were brought to the United States at the close of the Vietnam War to be placed in adoptive homes. The INS invoked the Attorney General's discretionary parole authority under 8 U.S.C. § 1182(d)(5) to permit the children to live in this country. As a result of that parole decision, certain children who were not properly adopted were allegedly involuntarily detained in the custody of adoptive parents. Accordingly, their status was identical in all relevant respects to that of petitioners in this case: excludable aliens physically present in the United States but not "admitted," who were involuntarily detained as a result of a parole decision under 8 U.S.C. § 1182(d)(5).[30] As in this case, the government argued that its actions under the parole statute are not subject to constitutional review. The Ninth Circuit emphatically re-

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[30] In *Nguyen Da Yen* involuntary detention resulted from decisions to grant parole, rather than decisions to deny it, as in this case. However, this factual distinction has no bearing on the legal issue presented. There is no plausible basis for holding that an affirmative parole decision indirectly resulting in incarceration is subject to review, but a decision to confine a person in federal prison is not.

joined that the challenged action was necessarily subject to constitutional scrutiny notwithstanding any intent to immunize it from review:

> Simply put, defendants' discretion does not extend to the violation of constitutional rights, nor can it—the sovereignty they exercise, whether delegated by Congress to be exercised with strict limitations or in a broadly discretionary manner, is always and necessarily bounded by the limitations placed on that power in the Constitution. A court of competent jurisdiction may entertain a suit to remedy a deprivation committed by an unconstitutional exercise of discretion in the same manner as a suit to remedy any other act violative of constitutional rights. . . . [*Id.* at 1199.]

In sum, the precedents of this and other courts demonstrate that the federal government may not deprive a person of his physical liberty pending an exclusion hearing except upon affording the equal protection of the law. Even if one treats petitioners as if they were outside the United States, or "stopped at the border," there simply is no valid basis for concluding that their incarceration is exempt from constitutional scrutiny.

III. THE ENTRY DOCTRINE DOES NOT IMMUNIZE PRE-HEARING INCARCERATION FROM CONSTITUTIONAL SCRUTINY.

A. The Entry Doctrine Applies Only to the Decision to Admit or Exclude an Alien and the Procedures Used to Reach that Determination.

The Eleventh Circuit rested its unprecedented decision on a fundamental misconception of the "entry doctrine." That doctrine provides that aliens who have not "entered" the United States have no constitutional protection with respect to their admission. *See, e.g., Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). It has never been applied to invidious discrimination in incarceration, and its rationale has no relevance to incarceration.

The doctrine derives from legal principles specifically related to the admission of aliens. This Court has held the power to regulate immigration to be an essential attribute of sovereignty. *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889). Consequently, the political branches have been allowed broad authority to define grounds of eligibility for entry or status as an immigrant or nonimmigrant, and to establish procedures by which those criteria will be applied. *Id.* Once an alien has entered the country, however, he may not be expelled or denied readmission without the benefit of certain constitutional protections. *See, e.g., Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50, *aff'd as mod'd*, 339 U.S. 908 (1950); *The Japanese Immigrant Case*, 189 U.S. 86 (1903).

Consistent with the entry doctrine's purpose, this Court has applied it only to disputes over admissibility or the procedures used to determine admissibility. The seminal entry fiction case, *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), addressed the process due to an excludable alien who was allowed to disembark and remain in the country pending a determination of her admissibility. The Court held that unadmitted aliens are due only that process with respect to their admission applications that is granted by Congress and Executive officials acting within the scope of their delegated powers. *Id.* at 660. The political branches' authority over admission would be compromised if an alien gained greater rights with respect to admission merely by being permitted to disembark pending a ruling on her application; hence the fiction that an alien paroled upon arrival is deemed not to have "entered" the country for purposes of admission. Nothing in the Court's opinion suggests that plenary congressional authority with respect to admission standards and procedures has any bearing on constitutional rights applicable to aliens in any other context, including incarceration.

The distinction between the rights of admitted and unadmitted aliens was clarified in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). The Court held that a resident alien seeking to re-enter the country after a temporary absence has constitutional rights with respect to his admission, unlike an alien who has not previously entered. The resident alien's exclusion without notice of the charges against him therefore violated the Fifth Amendment. The Court also indicated that the Due Process Clause of the Fifth Amendment would not protect an excludable alien in exclusion proceedings, but did not address rights in any other contexts.[31] *Id.* at 600.

In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court again held that an excludable alien is not entitled to procedural due process in an exclusion proceeding. As in *Kwong Hai Chew*, the court in *Mezei* contrasted the constitutional rights of resident and unadmitted aliens and held that " '[w]hatever the procedure authorized by Congress is, it is due process as far as an [excludable] alien denied entry is concerned.' " *Id.* at 212, quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). As in this Court's other entry doctrine cases, the Court neither addressed discrimination nor suggested that aliens who have not been ordered excluded lack constitutional protection with respect to their incarceration.[32]

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[31] In one broad passage, the Court stated that " 'excludable' aliens . . . are . . . not within the protection of the Fifth Amendment." *Kwong Hai Chew*, 344 U.S. at 600. It is clear from the context, however, that the court was addressing the protections applicable to an exclusion proceeding, and did not purport to suggest, much less hold, that protections are lacking in other situations. Indeed, such a suggestion would have been flatly inconsistent with numerous holdings recognizing that aliens are protected by the Constitution. *See* Section II, pp. 12-18 *supra*.

[32] Because of the failure of any other country to admit *Mezei*, he was unable to leave Ellis Island after the decision to exclude him. For the same reason, parole pending deportation would have resulted in a *de facto* indefinite admission, thereby nullifying the exclusion decision. The Court indicated that *Mezei's de facto* confinement did not violate his constitutional rights, resting its judgment on the plenary power to exclude. *Id.* at 215. Because *Mezei* did not involve invidious race or nationality discrimination, and because the parole of petitioners pending their exclusion hearings would not impinge upon—much less nullify—the authority to exclude them, *Mezei* does not support the result below. However, if the Court deems *Mezei* to be on point, it should be overruled or confined to its facts for the reasons stated in Sections I & II *supra*.

Most recently, in *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), the Court stated again that "an [excludable] alien seeking *initial* admission to the United States . . . has no constitutional rights *regarding his application* [for admission]." *Id.* (emphasis added). The court took pains not to suggest that excludable aliens lack constitutional protection in any other respect, including their physical liberty.

All of the cases in which this Court has applied the entry doctrine are consistent with *Nishimura Ekiu*, *Kwong Hai Chew*, *Mezei*, and *Landon*. Each involves alleged constitutional infringements resulting from admission decisions or the procedures used to reach them.[33] In no decision did the Court suggest, much less hold, that plenary congressional authority over admission has any bearing on constitutional rights applicable to aliens in any other context, including incarceration. In the cases in which excludable aliens asserted the violation of constitutional rights by official actions other than exclusion or exclusion procedures, by contrast, the entry doctrine has been entirely ignored,[34] or mentioned only by way of pointing out its inapplicability.[35]

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[33] *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 521 (1950) (unadmitted alien may be permanently excluded without a hearing on her application for admission); *Kaplan v. Tod*, 267 U.S. 228 (1925) (exclusion of excludable alien).

[34] *See, e.g., Russian Volunteer Fleet*, 282 U.S. 481; *Demanett*, 629 F.2d 862; *Toscanino*, 500 F.2d 267.

[35] *See, e.g., Wong Wing*, 163 U.S. at 237; *Rodriguez-Fernandez*, 654 F.2d at 1386-1387; *Henry*, 604 F.2d at 913-914.

The present case does not involve admission, but the right not to be deprived of physical liberty on grounds of race or national origin. Petitioners do not assert in this Court a right to admission, nor any procedural rights with respect to the admission decision. Parole will have no effect on their rights with respect to admission. *E.g.*, *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *Kaplan v. Tod*, 267 U.S. 228 (1925). Temporary release of certain Haitians has not hampered the INS in subsequently deporting them. Thus, petitioners' challenge to race and nationality discrimination in incarceration does not, even indirectly, put in question the political branches' plenary authority over admission. Accordingly, the function of the entry doctrine is not implicated.

B. No Relationship to the Admission Process Places the Incarceration of Petitioners on the Basis of Their Race or Nationality Beyond Constitutional Review.

The court below correctly recognized that incarceration, not admission, was at stake. P.A. A6. However, it stated that "the key question" was whether the parole decision is "an integral part" of the admissions process. *Id.* at 971. The court answered the question affirmatively, despite the fact that pre-hearing detention is by no means essential to exclusion, and was exceptional rather than routine until after the filing of this litigation. *Amici* submit that a decision that has no bearing on admission or admission policies cannot be deemed immune from review under the entry doctrine merely because it is taken by immigration agents prior to an alien's admission.[36] The Eleventh Circuit apparently agrees, since it attempted to justify its conclusion by alluding to policies that both admission policy and preadmission detention allegedly

[36] Otherwise, for example, Congress would be free to authorize INS employees to resolve summarily any criminal charges brought against an excludable alien, thereby making that decision "an integral part" of the admissions process and nullifying all constitutional safeguards.

foster, concluding that "the immediate implications of parole and legal admission are identical in a number of important respects." P.A. A16. The court below offered no authority for its novel theory that an alleged "integral" relationship between an area of executive and congressional discretion (admission of aliens) and another type of government action (incarceration) renders the latter immune from constitutional scrutiny. Indeed, no such precedent exists. This is not surprising, for the Eleventh Circuit's theory suffers from at least four fatal flaws.

First, even assuming that an integral, functional relationship to an area of absolute executive discretion might justify also immunizing incarceration from constitutional review, the Eleventh Circuit erred by examining the wrong relationship. The Court examined the nexus between exclusion and preadmission incarceration in general. That relationship is irrelevant because petitioners do not here challenge the constitutionality of a grant of general authority to the Attorney General to detain refugees pending exclusion hearings. Nor do they challenge detention decisions reached solely on the basis of the legitimate policies alluded to by the court.[37] Rather, petitioners challenge incarceration based on invidious race and national origin discrimination. Accordingly, if the government seeks to escape the constitutional strictures applicable to incarceration, it must first identify an integral relationship between the discretionary authority to admit and incarceration on the basis of race or national origin.

[37] The court below cited national security and quoted language from *Mezei* referring to the prevention of absconding pending deportation. P.A. A15-16. However, there was no evidence that petitioners posed either a national security threat or risk of absconding, and the INS did not claim to have based its detention decisions on such findings. See p. 4 *supra*. While the court below also cited the protection of employment, P.A. A16, the use of incarceration to protect jobs is superfluous in light of the ability to condition parole on non-employment. 8 U.S.C. § 1182(d)(5).

That argument would have to identify a substantive admissions policy or procedure that is furthered by those detention criteria. No such demonstration has been attempted, and none would be possible.

This Court's decisions conclusively demonstrate that the relationship upon which the Eleventh Circuit relied—between exclusion and the general practice of incarceration pending admission—cannot immunize other specific challenged conduct from constitutional review. In *Wong Wing*, 163 U.S. 228, this Court reviewed an Act of Congress authorizing the imprisonment of aliens who failed to follow admission procedures upon arrival. Wong Wing challenged the statute on the ground that the imposition of such imprisonment without indictment or trial by jury violated constitutional guarantees. The general government program in *Wong Wing*—punishment of those who evade the admissions process—is as integral to exclusion as pre-hearing incarceration.[38] Therefore, the factual postures of *Wong Wing* and this case are essentially identical. In each case, the general government authority pursuant to which the aliens were incarcerated promotes admissions policy, and in that sense is "integral" to it. Nevertheless, in *Wong Wing*, the Court subjected the statute to constitutional scrutiny, and struck it down.

United States v. Henry, 604 F.2d 908, also illustrates the invalidity of the integral relationship theory. Upon arrival in this country, Henry was questioned by INS authorities and lied about his citizenship. When prosecuted for misrepresenting his citizenship, he defended on the ground that *Miranda* warnings had not been given. As in this case, the INS argued that Henry lacked constitutional protection because the questioning was an in-

[38] Punishment of evasion advances admissions policy by deterring aliens who may not be eligible for admission from illegally entering the United States without screening. It thus helps to ensure that the INS will have an opportunity to apply the admissions standards defined by Congress and the Executive.

tegral part of the exercise of the Executive's authority to exclude aliens. Indeed, inspection upon entry is far more integral to the admission decision than prolonged detention; unlike incarceration, inspection is *essential* to admission. Yet the Fifth Circuit held that the Fifth Amendment applied and was violated. *Id.* at 914, 920.

In sum, the fact that the general authority to detain aliens pending exclusion hearings is functionally related to some aspects of an admission procedure cannot immunize from judicial review invidious discrimination in the application of that authority. To hold otherwise would be directly contrary to *Wong Wing* and *Henry*, as well as cases such as *Nguyen Da Yen*.[39]

The second fatal flaw in the Eleventh Circuit theory is that, even where the constitutionally challenged practice directly advances executive or legislative policy in an area committed to the political branches' authority, that integral relationship does not immunize the challenged conduct from review. The Court has clearly established this principle in cases involving the war power. Like the authority over immigration, the war power is committed to Congress and the Executive, who enjoy a "wide scope for the exercise of judgment and discretion" in exercising it. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). *See* L. Tribe, *American Constitutional Law* § 5-16 at 276 (comparing the war and immigration powers). Nevertheless, this Court has subjected actions taken pursuant to the war power to vigorous constitutional scrutiny. For example, *Korematsu*, 323 U.S. 214, involved the wartime decision by military authorities to exclude persons of Japanese ancestry from a large area of the western United States, and to quarantine them in relocation camps. The authorities deemed this necessary because they believed that the loyalties of some Japanese Americans, who could not be readily identified and segregated from others, would lie with Japan. Japanese loyalists

[39] *See* pp. 17-18 *supra*.

might prove a grave threat to security at home and the war effort abroad by sabotaging military facilities or providing intelligence to the enemy. Although the specific challenged practice—use of racial and national origin criteria in incarceration—allegedly was integral to the war effort, and was taken pursuant to the congressional and executive war power, this Court subjected that action to constitutional scrutiny. Indeed, as is appropriate in the case of discrimination on the basis of suspect classifications, the level of scrutiny was "the most rigid." *Id.* at 216. While the Court found the relationship between the challenged practice and the war effort to be pertinent to the *application* of the constitutional standard, it had no bearing whatsoever on the *applicability* of constitutional limits. Similarly, in *Hirabayashi*, this Court held that a wartime curfew applicable to persons of Japanese descent was subject to strict constitutional scrutiny. 320 U.S. at 93-105.

More recently, in *United States v. Robel*, 389 U.S. 258 (1967), Congress' effort to prohibit communists from working at defense facilities received close constitutional scrutiny, notwithstanding the obvious relationship of the practice to the war power. This Court also has subjected the male-only draft registration program to equal protection scrutiny, although it is an integral part of Congress' program to raise and regulate armies. *Rostker v. Goldberg*, 453 U.S. 57 (1981).[40] In sum, this Court's decisions consistently have demonstrated that the mere relationship of a challenged practice—particularly one involving the deprivation of physical liberty—to an area of special legislative and executive discretion does not immunize that action from constitutional scrutiny. This Court's declaration in *Robel* concerning the war power

[40] *See also Brown v. Glines*, 444 U.S. 348 (1980) (review of military regulation prohibiting distribution of literature on base without permission of commander); *Parker v. Levy*, 417 U.S. 733 (1974) (review of military code's prohibition of conduct "unbecoming an officer and a gentleman").

is equally applicable to the immigration power; invocation of that authority cannot serve as a "talismatic incantation to support any exercise of congressional power which can be brought within its ambit." 389 U.S. at 263.

The third fatal flaw in the analysis below is that, if the court had focused on the challenged practices, it would have found *no* pertinent relationship, much less an "integral" one, since discriminatory incarceration advances no admission policy. In the first place, the use of race and national origin criteria in the immigration context is directly contrary to both express congressional and executive policy.[41] Secondly, even in the absence of such a direct conflict with official policy, there is no reason to believe that persons of particular races or nationalities are *ipso facto* security threats or likely to abscond. Therefore, no immigration policy would be advanced by racial or national origin criteria, and no legitimate government interest will be harmed by recognizing petitioners' constitutional rights.

The fourth fatal flaw in the Eleventh Circuit's theory is that it proves far too much. No constitutional right would be applicable to any INS practice integrally related to exclusion. Boats of refugees could be sunk; border guards could shoot people attempting to cross the border without authorization; excluded aliens could be put to death if no other country agreed to accept them; property owned by nonresident aliens could be confiscated without just compensation—all beyond constitutional scrutiny. It is unimaginable that, if such practices arose, a court would not find them to be deprivations of life, liberty, or property requiring constitutional review. As Justice Jackson and others have pointed out, such cannot be the meaning of this Court's decisions.[42]

[41] *See* note 20 *supra*.

[42] Justice Jackson noted that due process would be violated if an excludable alien were thrown into the sea, set adrift, or deprived of his valuables. *Mezei*, 345 U.S. at 226-227 (dissenting opinion). *See also Rodriguez-Fernandez*, 654 F.2d at 1387 (due process would

CONCLUSION

This case presents a profound and tragic irony. Petitioners came to this country risking life itself to seek safe harbor from oppression. Having come in a quest for freedom, they were incarcerated in prisons and detention camps because of their race and national origin. The holding that the federal government can deprive these people of the most basic freedom—physical liberty—by application of the criterion most condemned by our history and values—invidious race and national origin discrimination—without the slightest degree of constitutional scrutiny, is too unprecedented, its rationale too at odds with our basic values, and its consequences too great, to be sanctioned by this Court.

For the foregoing reasons, *amici* respectfully submit that the Court should reverse the decision below, and declare that the Fifth Amendment requires the United States to afford due process, including the equal protection of the laws, when subjecting excludable aliens to incarceration pending resolution of their requests for admission.

Respectfully submitted,

ROBERT H. KAPP *
DAVID W. BURGETT
PATRICK B. FAZZONE
JONATHAN L. ABRAM
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4072
(202) 331-4597
Counsel for Amici Curiae

RODERIC V. O. BOGGS
CAROLYN WALLER
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Of Counsel

* Counsel of Record

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not permit Congress to deprive an alien of his property without just compensation, or order him killed because his country would not accept him back).

AMICUS CURIAE

BRIEF

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No. 84-5240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL.,

Petitioners,

v.

ALAN NELSON, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Motion

~~PETITION~~ FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Dale M. Schwartz
David A. Webster
Deborah S. Ebel
Kenneth A. Hindman
Myron N. Kramer

Troutman, Sanders, Lockerman
& Ashmore
127 Peachtree St., N.E.
1400 Candler Building
Atlanta, Georgia 30043
(404) 658-8000

Counsel for Amici Curiae

No. 84-5240

IN THE

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MARIE LUCIE JEAN, ET AL.,

Petitioners,

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ALAN NELSON, ET AL.,

Respondents.

PETITION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AGUILAR-RAMOS AND LEZCANO-PUEY IN SUPPORT OF PETITIONERS MARIE LUCIE JEAN, ET AL.

I. Summary of Position

Amici AGUILAR and LEZCANO are applicants for admission to this country who have been locked up for months at the United States Penitentiary in Atlanta (hereinafter Atlanta or "the Penitentiary"). They are members of the plaintiff class in *Fernandez-Roque* v. *Smith,* pending in the United States District Court for the Northern District of Georgia, seeking minimal due process protections in the decisions whether to release them or detain them. The outcome of that litigation may be determined by the Court's decision in the case at bar. Because the procedural due process aspects of Fifth Amendment protections call for a somewhat different analysis from the equal protection concerns presented by Haitian Petitioners, Amici file this their brief to underscore those important differences while supporting the position of the Haitians.

II. Statement of Facts

Amici came to this country in the spring of 1980 as part of the Freedom Flotilla, also known as the Mariel Boatlift, with approximately 125,000 other Cubans. Nearly all of the Mariel Cubans were paroled and resettled in the United

States as "Cuban-Haitian entrants—status pending". In recent weeks, the government has taken steps to regularize the status of most of the Mariel Cubans by taking applications for permanent resident status.

A number of Cubans, approximately 1,800, were identified by the Immigration and Naturalization Service (INS) as offenders in Cuba or in American processing camps, or as having mental problems. They were not paroled but instead were institutionalized, mostly at the Atlanta Penitentiary, and most were placed in exclusion proceedings pursuant to 8 U.S.C. §§ 1225, 1226.

After one year of imprisonment and after class certification in *Fernandez-Roque*, the government adopted a "Status Review Plan and Procedures" (subsequently amended [hereinafter "the Plan"]) for determining releasibility on parole of the so-called "detainees". The Plan's operation has demonstrated that not all deserve imprisonment. Large numbers have been paroled to families, to halfway houses or to much less structured sponsorships. The Cubans argue, however, that many who deserve freedom are still denied it because of gross procedural defects in the Plan which allow unsubstantiated and sometimes unsubstantiable allegations to go unchallenged, or detention for no apparent reason.

Despite releases under the Plan, the "detainee" population has risen rather than declined in recent months. Others like Amici who were free on parole have had their parole revoked and been imprisoned for minor offenses, after completely serving their sentence. Some were whisked off to the Penitentiary without an opportunity to defend criminal charges, some without even a decent explanation of why they were being imprisoned, and some not for any criminal conduct, but rather merely for violation of halfway house rules.

Amici well illustrate the pitfalls of a procedurally inadequate Plan. Both have been found excludable only for lack of entry papers (8 U.S.C. §1182(a)(20)), and neither has been convicted of any crimes in this country.

Amicus AGUILAR was about 16 upon his arrival. He had been in a Cuban reform school, for petty theft of some

crayons, a radio, a pigeon and a chicken. He came to the United States with his mother, but was separated from her upon arrival in the United States, and INS has apparently made no attempt at reuniting them. Upon arrival in this country he was placed in a halfway house for juveniles in Denver. When that closed, he and several other young Cubans were sent to a series of county jails and other detention centers across the country simply for lack of a better place to house them. Aguilar was treated very badly at these institutions (and recovered monetary damages against one for its brutal treatment). His treatment led him to attempt suicide twice, and he had to be hospitalized for a period of time. While detained in an Illinois facility, he filed a habeas corpus action. He dismissed the habeas upon the written guarantee by the government that he would be released from the hospital, spend eight months in a halfway house program, and then, at the end of this period, be released to his mother's care or to independent living. After the requisite eight months at the halfway house, the government breached the agreement and shipped him to the Atlanta Penitentiary. Despite exemplary behavior in Atlanta, he has been denied release.

Amicus LEZCANO, like the overwhelming majority of arrivals, was released to private sponsorship in 1980. In 1982, he was hospitalized at St. Elizabeth's for an acute paranoid episode, common in uprooted immigrants. He was treated and cured, and paroled to a halfway house where he fell in love with a staff member. She was fired for violation of institutional rules and his parole was later revoked for the same reason. He was returned to St. Elizabeth's, which upon arrival pronounced him sane and healthy and recommended immediate release. Instead, six months later he was shipped to Atlanta. He was denied release on parole upon review of his file, even though his conduct record in the Penitentiary is also unblemished.

In a July, 1983 Order, the district court in *Fernandez-Roque* found sweeping denials of due process in the operation of the Plan, permitting unjustified revocation of parole and continued detention of those like Amici, as well as permitting unjustified refusal to release detainees in the first instance.

Among those denials were lack of notice of charges, use of hearsay and denial of cross-examination rights, lack of opportunity to review the record prior to release interviews, and shifting of the burden of proof to detainees to demonstrate such intangibles as lack of dangerousness, 567 F. Supp. 1115 (N.D. Ga. 1983).

On appeal, the Eleventh Circuit Court of Appeals reversed, holding that the Cuban detainees lacked a core liberty interest in their freedom, relying upon this Court's decision in *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1953); and the Eleventh Circuit's *en banc* decision in the instant case. In *Fernandez-Roque*, the Eleventh Circuit remanded to the district court for further proceedings on the Cubans' argument for a liberty interest arising from other sources, including customary international law, President Carter's invitation to Mariel Cubans and the Plan. 734 F.2d at 576 (11th Cir. 1984). Rather than seek certiorari as to this interim order, the Cubans in *Fernandez-Roque* have reserved the "core" liberty interest issue for later petition, while also arguing the issues remanded. Although motions for summary judgment have just been filed on the international law issue and on the federally created liberty interest issue, no decision has yet been made by the District Court. The interests of Amici and other class members are obviously affected by this Court's grant of certiorari in the case at bar, to consider "core" liberty interests.

Candidly, the precise manner in which those interests may be affected is presently up in the air. As this Court is aware, our government recently announced an agreement with Cuba for the return of 2,746 Mariel Cubans, to be accomplished over several years time. Thus long-term detention still faces many of those in Atlanta as a monthly maximum of 100 are returned.

An additional gap prevents complete assessment. It is unknown whether the government intends to hold present and future detainees at the Penitentiary even if they are not listed among the 2,746. However, at present the plan is still operational despite the Agreement, and Amici anticipate that

Cubans will remain in detention even after the deportation of the 2,746. Therefore, Amici's due process claims remain important despite the agreement with Cuba.

The Court should also know that the final exclusion orders of the plaintiff class in *Fernandez-Roque* have been ordered reopened for consideration of class-wide asylum claims, on the merits, the District Court having recently ruled that Plaintiffs had made out a *prima facie* case of likely persecution (based on membership in the Freedom Flotilla) should they be returned to Cuba. The effect of the reopenings is to prevent physical deportation of detainees pending an actual asylum hearing and ruling. Thus, immediate effectuation of the Agreement with Cuba remains uncertain at this point. Regardless of anything else, due process concerns affect the decision to maintain in the Penitentiary or release, during the many months it will take to obtain an asylum ruling.

III. Conclusion

Amici and the litigating class below have a vital interest in the outcome of the case at bar should the Court choose to reach the issue of whether excludable aliens have "core" liberty interests in their freedom.

Respectfully submitted,

DALE M. SCHWARTZ
DAVID A. WEBSTER
DEBORAH S. EBEL
KENNETH A. HINDMAN
MYRON N. KRAMER

Counsel for Amici Curiae
1400 Candler Building
Atlanta, Georgia 30043

No. 84-5240

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Respondents.

BRIEF OF AMICI CURIAE LORENZO AGUILAR-RAMOS AND LAZARO LEZCANO-PUEY IN SUPPORT OF PETITIONERS MARIE LUCIE JEAN, ET AL.

I. Factual Statement

The facts of Amici's situation are spelled out in their Petition for Leave.

II. Summary of Argument

Excludable aliens have a "core" liberty interest in their freedom. Even if short term detention for immigration processing does not implicate due process concerns, detention for the asserted purpose of protecting the American public does implicate such concerns.

Shaughnessy v. *Mezei* must be discarded at least in part, in light of more modern procedural due process analysis. That analysis requires looking first at interests in liberty or property to see if they are constitutionally protected, and only later at costs to the government to see what specific procedures should be afforded. Excludable aliens are protected by due process except in exclusion hearings to determine immigration status.

Finally, recognition of such a liberty interest is consistent with all relevant government interests and concerns. Due

process protections extend to aliens. Due process is consistent with excludability. Due process protections are available outside our borders. Due process is consistent with the government's foreign affairs powers.

III. Amici Have a "Core" Liberty Interest in Freedom

A. *Freedom from Restraint is a "Core" Liberty Interest.*

This Court has held that certain "core" liberty interests are so fundamental as to be triggered by living and breathing, without reference to separate guarantees in statutes, regulations or any other source. "Liberty interests may arise from two sources—the Due Process Clause itself and the laws of the States [here, the United States.]" *Hewitt* v. *Helms*, 74 L.Ed. 2d 675, 685 (1983). The liberty protected by due process includes the fundamental right to freedom of movement and other incidents of personal security:

> "Among the historic liberties" protected by the Due Process Clause is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security".

Vitek v. *Jones*, 445 U.S. 480, 492 (1980) (citation omitted).

The "core" liberty interest in freedom from restraint has been recognized in a host of contexts: *see, e.g., Vitek* v. *Jones, supra.* at 494 ("mandatory behavior modification" invokes a liberty interest); *Graham* v. *Richardson*, 403 U.S. 365, 376 (1971) (right to travel is a fundamental constitutional right); and *Fay* v. *Noia*, 372 U.S. 391, 402 (1963) (writ of habeas corpus fundamental to other due process rights).

In short, the Constitution protects freedom from intrusion on bodily integrity, regardless of any separate liberty interest created otherwise. The government's detention of Amici is an extreme example of bodily restraint invoking due process liberty interests.

B. *Deterrent or Preventive Detention Invokes Liberty Interests.*

While short-term deprivations may on occasion be permissible without procedural protections, longer-term denials of liberty must be accompanied by due process. *Goss* v. *Lopez*, 419 U.S. 565 (1975). The government's desire to exclude might have justified short-term detention without due process in or about 1980, when Amici first arrived. It does not justify their detention for months and, for certain Cubans, almost half a decade. The government's imprisonment of Amici so long after attempted entry could only be justified as preventive detention: any doubt is removed by the terms of the Attorney General's own Plan, which provides for release absent present or likely future violence or criminality.

This court has held unequivocally that such a change in the reasons for detention triggers due process rights. Liberty interests arose, for example, upon transfer of convicted and sentenced criminals to mental institutions, *Vitek* v. *Jones*, 445 U.S. 480 (1980); upon holding of prisoners beyond the term of their sentences, for observation of mental illness, *McNeil* v. *Patuxent Institution Director*, 407 U.S. 245 (1972); upon holding for evaluation of competence to stand trial, beyond the maximum permissible term of punishment, *Jackson* v. *Indiana*, 406 U.S. 715 (1972); and upon interning because of community fears, after the purpose of evacuation from a military zone had been accomplished, *Ex Parte Endo*, 323 U.S. 283 (1944) (detention power construed narrowly in order to avoid constitutional issues).

> If there is to be the greatest possibie accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.

Endo, 323 U.S. at 302.

When ample time has passed for exclusion processing, and the government continues to detain for purposes such as

deterring immigration or preventing crime, this new purpose invokes a liberty interest.[1]

Having a liberty interest, Amici show in the next section that *Mezei* should not be reaffirmed, at least in the context of procedural due process. To the extent *Mezei* permitted long-term detention of excludable aliens without due process, it has been deprived of force by subsequent decisions of this Court.

IV. Modern Due Process Analysis Supports Amici's Liberty Interest

Mezei, to the extent it circumscribes procedural due process protections in exclusion hearings, is consistent with more recent decisions of this Court. In limiting also due process rights in the decision to restrain, however, *Mezei* is flatly inconsistent with subsequent development of due process doctrine. Specifically, the 1953 opinion overrode entirely Mr. Mezei's entitlement to procedural due process because of an assortment of government interests and concerns. These included immigration and its parent concern, international affairs; military and political security, state secrets that might be divulged in the course of an open hearing; and the practical difficulty of release without supervision, in the absence of an established parole policy and implement-

[1] Amici's final basis for a liberty interest is unlike any claimed by Haitian Petitioners. Amici, like the majority of detainees now held at Atlanta, were free on parole but had their parole revoked without any due process protections. Precisely as this Court held in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and for precisely the same reasons, Amici suggest that persons with no liberty interest in the original grant of parole nevertheless have such an interest once parole is granted. Amici will not distract the Court with a lengthy recitation of this separate analysis; they raise it only to demonstrate that the existence of liberty interests for due process purposes is a complex inquiry, and that this Court should be careful to avoid untoward foreclosure of legitimate constitutional interests in deciding Haitian Petitioners' equal protection claims.

ing procedures. Only tangentially did the Court concern itself with Mr. Mezei's interest in going free.[2]

All of this is exactly backwards from more modern due process analysis. See *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The modern test requires the following two-step examination. *First*, the Court scrutinizes the nature of the deprivation suffered, disregarding both its weight and any competing considerations that mitigate against full due process rights. This first step determines whether a liberty or property interest is implicated. *Second*, once the liberty or property interest is established, the Court then balances this against concerns like those expressed in *Mezei*. This step determines the type of notice and hearing that will be due. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

Mezei, decided without benefit of *Eldridge* and *Morrissey*, short-circuited this process in two crucial respects. First, in loosely equating exclusion and detention, that Court failed to identify with precision Mezei's separate liberty interest in walking free, as opposed to his interest in not being dispatched to another country. Second, that Court improperly (under the *Eldridge* analysis) relied on several asserted governmental interests (national security, state secrets) as precluding any liberty interests, rather than simply as factors to be weighed in determining the nature of the process required in his case. *Board of Regents* v. *Roth*, 408 U.S. 564, 570-71 (1972). Thus *Mezei* is consistent with later developments in due process only to the extent that national security or state secrets, or both, were in that instance such important governmental interests as to outweigh the detainee's interest in procedural protections.

The proper starting place under *Eldridge* is Amici's fundamental liberty interest in freedom. The government's interest in orderly procedure or other concerns may suggest some limiting of due process procedures, but do not extinguish that liberty interest.

[2] Mezei was in fact paroled after unsuccessful attempts to ship him to other countries. New York Times, August 12, 1954, at 10, col. 4.

The following section will explore the various asserted government interests and suggest that all of them are consistent with affording appropriate procedural protections in the decision to release or detain.

V. Due Process Is Consistent With All Asserted Governmental Interests

A. *Due Process Protects Aliens.*

This Court has held consistently that our govenment has no valid interest in denying due process to aliens. See *Wong Wing* v. *United States*, 163 U.S. 208 (1896) (right to trial before punishment); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 102-03 (1976) (aliens' liberty interest includes eligibility for federal employment); see also *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931) (aliens have property interests for purposes of Constitution's Taking Clause); *Mathews* v. *Diaz*, 426 U.S. 67 (1975) (aliens enjoy due process rights generally).

B. *Due Process Protects Excludable Aliens.*

United States v. *Henry*, 604 F.2d 908 (5th Cir. 1979), held that Constitutional guarantees protect an excludable alien in a criminal trial. Neither this Court nor any other has had the opportunity to pass on similar questions, but *Henry's* analysis seems unassailable: anyone, including an excludable alien, is entitled to basic procedural safeguards when at risk of a criminal sentence. *Cf. Wong Wing, supra.*

At the other extreme, aliens applying for admission ("entry") into this country are entitled to no particular process *in the decision to admit or exclude them:*

> This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.

Landon v. *Plasencia*, 459 U.S. 21, 32 (1982). Notably, the Court's statement is limited to the application for admission,

which involves only the applicant's technical immigration status.

Although the government relies strongly on *Mezei* for the argument that exclusion and detention are necessarily coextensive conditions, the subsequent decision in *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-90 (1958), demonstrates otherwise.

When *Mezei* was decided, there was no statutory provision for parole of excludable aliens, 345 U.S. 216, so that confusion of exclusion with unavoidable detention was understandable, indeed may have been the only possible view. Yet *Leng May Ma*, decided after statutory enactment of parole for excludables, recognizes and holds that exclusion and detention are *not* coequal. Specifically, it holds that an alien at large on parole in this country does not lose the fictional characteristics of excludability. If custody is unnecessary to preserve excludability, then the obverse also follows: excludability does not necessarily entail custody, especially without due process rights. Because parole and admission are very different concepts, both practically and theoretically, *Leng May Ma* v. *Barber, supra.*, the government is not free to claim that Amici's interest in parole equates with an interest in admission.

Locking someone up is different from packing him home on the next boat or airplane. It is a different deprivation, implicating constitutional interests of the highest order. Due process compels no particular exclusion hearing procedures, partly because of the government's and the alien's coextensive interest in promptness precisely to avoid the deprivation, trouble and expense of detention. So long as government decides to detain, however, it has no interest in haste, and those imprisoned must be afforded protections commensurate with their loss of liberty.

Cf. Ex Parte Endo, supra.

C. *Due Process Reaches Excludable Aliens Despite Their Fictional Extraterritoriality.*

The government suggests that excludables have no liberty interest because of the fiction that they remain outside the United States, even though they are physically present within this country's borders. The suggestion deserves two responses: first, due process limits government action even outside our borders; and second, the fiction has no place in assessing the process due in detention decisions.

1. Due Process Guarantees Exist Wherever the Government Acts.

Government is no more free to trammel due process rights abroad than at home. *Reid* v. *Covert*, 354 U.S. 1 (1957) (due process governs military trials of dependents and civilian employees abroad); *United States* v. *Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc); and *United States* v. *Cadena*, 585 F.2d 1252 (5th Cir. 1978) (Fourth Amendment applicable on the high seas).

2. Due Process Admits of No Fiction of Extraterritoriality.

The government's asserted fiction is bankrupt for any purpose except as a shorthand for the rule that applicants for admission have no right to any particular procedures in the exclusion process. *Landon* v. *Plasencia, supra.* It has no applicability to detention. This Court long ago discredited the notion that the right to freedom from governmental intrusion can be limited by territorial fictions. Instead, the Bill of Rights protects individual freedoms wherever they may be threatened. *Katz* v. *United States*, 389 U.S. 347 (1967) (electronic eavesdropping is a seizure even if no physical trespass). To the extent *Mezei* relies upon such fictions, it is

to be consigned to history as a "relic from a different era,"[9] overruled by subsequent due process rulings.

> Despite the impeccable legal logic of the Government's argument. . ., it leads to an artificial and unreal conclusion. We must regard this alien as deprived of liberty, and the question is whether the deprivation is a denial of due process of law.

Mezei, 345 U.S. at 220-21 (Jackson, J., dissenting).

The aliens' "liberty interest" is sufficient to guarantee them the protection of due process. Their physical restraint admits of no technical argument about who they are (Are they "persons"?) or where they are (Are they fictionally outside the United States?). Plaintiffs' incarceration is tangible enough to invoke constitutional guarantees. *Chin Low* v. *United States*, 208 U.S. 8, 12-13 (1908) (Holmes, J.).

The next and final task in the *Eldridge* analysis is to put the fiction behind us and balance the aliens' interests against competing considerations. Careful study shows that none overrides the aliens' claim to minimal due process protections.

D. *Excludable Aliens Are Entitled to Due Process Despite the Government's Asserted Foreign Affairs Power.*

The government claims that the aliens' loss of liberty cannot amount to a liberty interest. It asserts that the government's foreign affairs power, by constitutional fiat, overrides any claim to procedural rights. Amici will show that the government's reading of its own powers is faulty. Even the government's plenary powers are confined so as to maximize

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[9] *Reid* v. *Covert*, 345 U.S. 1, 12 (1957), discarding for due process purposes very similar territorial limitations in *Re Ross*, 140 U.S. 453 (1891): "The Ross Case is one of those cases that cannot be understood except in its peculiar setting; even then, it seems unlikely that a similar result would be reached today." 354 U.S. at 10. See also *Bloom* v. *Illinois*, 391 U.S. 194 (1968), disregarding a distinction (criminal proceedings versus equity's criminal contempts) far more deeply engrained in the law than the deportable-excludable distinction, in holding that serious criminal contempts also implicate liberty interests for purposes of the due process right to jury trial.

due process. *Reid* v. *Covert, supra.* (even treaty provisions must be read consistently with due process).

These limitations on governmental power are demonstrated most vividly by examining the very broadest power of all, namely the power to wage war. Due process rights survive even there. Some important due process rights may be suspended in wartime conditions. United States Constitution, Art. I, Sec. 9, Cl. 2; *Ex Parte Quirin,* 317 U.S. 1 (1942) (writ of habeas corpus). The express power to suspend the Writ, however, does not include unilateral and unreviewable legislative or executive authority to determine when war overrides individual liberties; rather, the judiciary must finally reconcile the war power with due process, *Ex Parte Merryman,* 17 Fed. Cas. 144, No. 9,487 (C.C.D.MD. 1861) (Taney, C.J.). See also *Duncan* v. *Kahanamoku,* 327 U.S. 304 (1946); *Ex Parte Milligan,* 4 Wall 2, 18 L.Ed. 281 (1866).

The limits of due process upon the foreign affairs power are even more obvious in peacetime. See *McElroy* v. *United States,* 361 U.S. 281 (1960); *Reid* v. *Covert, supra.*:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to florish would destroy the benefit of written Constitution and undermine the basis of our Government.

Reid, 354 U.S. at 14. See also *Haig* v. *Agee,* 453 U.S. 280, 309-10 (1981), holding that even national security concerns merely limit rather than extinguish due process rights.[4]

In short, the Amici's due process rights are consistent with controlling decisions of this Court and with the foreign affairs

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[4] In the Courts below, Amici and their class contend that foreign affairs has nothing whatsoever to do with their restraint, in that they are being held for the purely domestic purpose of protecting the American public from those likely to be violent or to commit crimes. Further, they contend that due process is perfectly consistent with the only foreign affairs interest remotely asserted, namely to prevent foreign governments from foisting off additional undesirables. Our government has not seen fit

(Footnote continued on next page)

power asserted by the government. Accordingly, their liberty interest is subject only to balancing for purposes of deciding which procedures are required.

VI. Relief Requested

Amici have sought to serve two purposes in this brief. First, they have sought to support the general position of the Haitian Petitioners, by showing that the Fifth Amendment protects excludable aliens in situations unrelated to their request for "admission" into this country; that *Shaughnessy* v. *Mezei,* far from controlling, is inconsistent with other cases of this court to the extent it is read to hold detention of excludables to be outside the protection of the Constitution; and that Constitutional protections in the limited circumstances of both the Haitian case and the Cuban case are consistent with the government's asserted interests, including its foreign affairs power.

Amici have also sought a very different purpose. Their brief ranges beyond the plight of the Haitian Petitioners, in order to familiarize this Court with the procedural due process implications of *Mezei.* They do so because one possible result in this case, as urged also by the government, is a holding that the Fifth Amendment in its equal protection aspect affords no protection against differential treatment of excludable aliens of different nationalities.

(Footnote continued from previous page)

to imprison all 125,000 Mariel Cubans (all of whom are excludable based on lack of entry papers) to accomplish this result; if it had, the policy-implementation exception to due process availability might be fatal to Amici's case. See *O'Bannon* v. *Town Court Nursing Center,* 447 U.S. 773 (1980). The government has chosen, however, to give a special Cuban-Haitian entrant status to the vast majority, to now enable those in such status to apply for permanent resident status; and to take a discriminating look at each Cuban to determine whether he individually is worthy of release. Such weeding out involves due process. *Goldberg* v. *Kelly,* 397 U.S. 254 (1969).

If this Court is inclined to rule against Haitian Petitioners, then Amici would urge precisely this narrow result. The procedural due process interests here advanced are grounded solidly in recent decisions of this Court, and sap *Mezei* of its vitality as to detention issues regardless of the fate of Haitian Petitioners' equal protection claims.

Respectfully submitted,

DALE M. SCHWARTZ
DAVID A. WEBSTER
DEBORAH S. EBEL
KENNETH A. HINDMAN
MYRON N. KRAMER

Counsel for Amici Curiae
1400 Candler Building
Atlanta, Georgia 30343

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 1985, copies of this Petition and Brief were mailed, postage prepaid to: Rex E. Lee, Solicitor General of the United States, Richard K. Willard, Esq., Barbara L. Herwig, Esq., and Michael Jay Singer, Esq., Department of Justice, Washington, D.C. 20530 and to Ira Jay Kurzban, Esq., Bruce J. Winick, Esq., Irwin P. Stotzky, Esq., Michael Rosen, Esq., Miami, Florida, Christopher K. Hall, Esq., Long Island City, New York and Robert E. Juceam, Esq., New York, New York, counsel for petitioners. I further certify that all parties required to be served have been served.

Counsel for Amici Curiae

AMICUS CURIAE

BRIEF

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No. 84-5240

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MARIE LUCIE JEAN, ET AL.,

Petitioners,

v.

ALAN C. NELSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE THE PROCEDURAL ASPECTS OF INTERNATIONAL LAW INSTITUTE, THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, THE INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, AND THE CENTER FOR CONSTITUTIONAL RIGHTS

Of Counsel:

Hurst Hannum
Richard B. Lillich,
David Carliner
Amy Young
Jerome J. Shestack
Sarah Wunsch
Frank E. Deal

Counsel:

*Roberts B. Owen,
O. Thomas Johnson, Jr.
David R. Grace
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

* Counsel of Record

AMICI CURIAE

Hurst Hannum
Richard B. Lillich
Procedural Aspects of
International Law
Institute
1346 Connecticut Ave., N.W.
Suite 1027
Washington, D.C. 20036
(202) 293-1008

Jerome J. Shestack
International League for
Human Rights
236 East 46th Street
New York, New York 10017
(212) 972-9554

David Carliner
Amy Young
International Human Rights
Law Group
1346 Connecticut Ave., N.W.
Suite 502
Washington, D.C. 20036
(202) 659-5023

Sara Wunsch
Frank E. Deal
Center for Constitutional
Rights
853 Broadway
New York, New York 10003
(212) 674-3303

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INTEREST OF AMICI CURIAE

The Procedural Aspects of International Law Institute is a non-profit organization of international lawyers and scholars which has consultative status with the United Nations Economic and Social Council (ECOSOC). Founded in 1965, it has conducted numerous research projects and has published books, monographs, and articles on the protection of private rights through international law. It has engaged in research under contract to the United States Departments of Justice and State on such issues as international regulation of narcotics, control of international terrorism, and autonomy and sovereignty in international law. The Institute recently completed a study on linkages between international human rights and United States constitutional law.

The International Human Rights Law Group was founded by the Institute in 1978; in 1983 it becsme a separate, non-profit organization

incorporated in the District of Columbia. The Law Group seeks to promote the observance of international human rights norms by providing legal assistance and information to individuals and groups on a pro bono basis, representing clients before international forums, and participating as amicus curiae in litigation in the United States involving international human rights norms. The Law Group is counsel to the National Council of Churches in a case concerning the treatment of Haitian refugees by the United States, currently pending before the Inter-American Commission on Human Rights.

The International League for Human Rights, founded in New York City in 1942, is among the oldest of the private international organizations concerned with the protection and promotion of human rights. The League addresses the full range of human rights issues, taking as its platform the Universal Declaration of Human Rights. The League enjoys consultative status

with the United Nations, its specialized agencies, and the Council of Europe, and works with more than forty affiliated civil liberties groups world-wide. Among the League's long-standing concerns are the rights of refugees under international law. In 1983 the League sent a fact-finding mission to Haiti to investigate human-rights problems.

The Center for Constitutional Rights (CCR), founded in 1966, is a non-profit organization dedicated to advancing and protecting the Bill of Rights and international human rights. CCR was counsel for plaintiffs in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), a landmark decision recognizing the binding nature of customary norms of international human rights and their applicability in U.S. courts.

As organizations dedicated to the rule of law and to securing compliance with international human-rights norms, Amici respectfully submit that for the reasons set out in the

following pages, the opinion of the United States Court of Appeals for the Eleventh Circuit sitting en banc was incorrect and should be reversed.

Consent to the filing of this brief has been sought and received from petitioners and the Solicitor General of the United States.

STATEMENT OF THE CASE

In the instant case certain Haitian aliens, while awaiting determinations by the Immigration and Naturalization Service (INS) concerning their applications for admission to the United States, were incarcerated for extended periods under harsh conditions.[1] Although Congress has enacted legislation authorizing the Attorney General to parole such aliens

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[1] For a more-complete description of the harsh manner in in which the Haitians were treated during their incarceration, see the STATEMENT OF THE CASE in Petitioners' Brief.

during the pendency of their applications for admission (8 U.S.C. §1182(d)(5)(A)), the immigration inspectors to whom this authority has been delegated refused to parole the Haitians.

In the courts below the Government failed to introduce any evidence that the negative parole determinations were based upon findings that individual Haitians were likely to abscond if granted parole or that their freedom of movement posed a threat to national security or public safety.[1] On the contrary, unrebutted evidence was presented that the Haitians had been the victims of invidious discrimination -- that Haitians were denied parole on the basis of their race and national origin. Jean v. Nelson, 711 F.2d 1455, 1483-1502 (11th Cir. 1983). Moreover, Government officials testi-

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[1] In fact, INS officials conceded that the Haitians were not incarcerated because they were a threat to national security or likely to abscond. Transcript at 1160, 2035, 2338, 2396, and 2398.

fied that neither the Attorney General nor any other senior official of the Executive branch had either ordered or authorized immigration inspectors to treat the Haitians in a discriminatory manner.[3] Thus the discriminatory conduct at issue was never a part of United States immigration policy; rather, it simply reflected the decisions of low-level INS employees.

On the basis of this evidence, a panel of the Court of Appeals for the Eleventh Circuit found that the plaintiffs had presented "a strong case of discrimination [which went] essentially unrebutted by the government." Jean v. Nelson, 711 F.2d 1455, 1501 (11th Cir. 1983). On review, the Eleventh Circuit en banc

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[3] In testimony before the District Court, Mr. Rudolph W. Guiliani, then the Associate Attorney General, stated that if the detention policy were being applied in a discriminatory manner, such conduct was contrary to the intent of the Attorney General and that the persons who were responsible "should be reprimanded or dismissed, maybe." Transcript 2343. See Jean v. Nelson, 711 F.2d 1455, 1473 (11th Cir. 1983).

left these findings undisturbed.[4] It nevertheless held that the Haitians had no constitutional, statutory, or other rights which protected them against such prolonged discriminatory detention. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), reversing 711 F.2d 1455 (11th Cir. 1983).

The en banc court gave only cursory consideration to the international-law issues raised by the case. Id. at 964 n.4. The court's failure to review fully the obligations imposed upon the United States by treaties and other

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[4] With respect to the factual record in the case, the en banc court merely noted that "[b]ecause the facts of this case have been extensively set forth in the opinions of the panel and the district court, we proceed directly to a discussion of the legal questions involved." Jean v. Nelson, 727 F.2d 957, 962 (11th Cir. 1984) (en banc), reversing 711 F.2d 1455 (11th Cir. 1983). The panel's findings of invidious discrimination thus constitute the relevant factual record in the case. However, if this Court determines, as Respondents urge, that this case comes before the Court on the basis of the District Court findings that the government had not discriminated against the Haitians on the basis of race or national origin, amici contend that those findings should be set aside as clearly erroneous.

international agreements to which the United States is a party and by customary international law is contrary to the mandate of the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. This brief will argue that a more comprehensive examination of these obligations requires that the en banc decision be reversed.[5]

While Petitioners did not specifically mention international law in posing the "Questions Presented" by this case, international-law issues are "fairly included" in Petitioners' questions within the meaning of Rule 20(1)(a) of the Rules of this Court,[6] and the case

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[5] The international-law issues raised herein were briefed, inter alia, in Plaintiffs' Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law at 45-65, Louis v. Nelson, 544 F.Supp. 973 (S.D. Fla. 1982); in the en banc brief of amici curiae the Lawyers Committee for International Human Rights and the Immigration Law Clinic, at 14-18; and in the en banc reply brief of the Government at 12-14.

[6] Petitioners evidently considered the international-law issues to be implicit in the questions they framed,

(footnote cont'd)

clearly requires the Court to determine the limits imposed by the United States Constitution on the treatment of unadmitted aliens. As discussed more fully below, international law is relevant to that inquiry in several ways. First, because international law is part of United States law, the Supremacy Clause of the Constitution requires that courts give it effect when it applies. Moreover, even where a specific international norm is not directly applicable, it may be used to inform a court's analysis of constitutional and statutory law. Thus in this case, the evolving principles of international human-rights law are clearly relevant to the Court's interpretation of the

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(footnote cont'd)
since in the Petition (at 20) they discussed some of the international-law principles developed in this brief. Even if the international law questions were not fairly included in the questions presented, the Court may consider them at its discretion when appropriate. See Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 320-21 n.6 (1971).

constitutional provisions invoked by Petitioners. Finally, as this Court has often recognized, international law is of particular relevance to the question of the scope of the Government's power with respect to the treatment of unadmitted aliens.[7]

SUMMARY OF ARGUMENT

The decision below held that excludable aliens have no constitutional, statutory, or other rights to protect them against prolonged incarceration on the basis of race or national

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[7] See, e.g., United States ex rel. Turner v. Williams, 194 U.S. 279, 290 (1904); Fong Yue Ting v. United States, 149 U.S. 698, 707-11 (1893); and Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); see generally Note, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957, 965-74 (1982). As amici discuss more fully infra, this case does not require this Court to decide whether there are any limitations on the Government's power to admit or exclude aliens. This case involves only the limitations on the Government's treatment of aliens pending exclusion proceedings. However, if this Court determines that those limitations derive from the exclusion power, amici submit that principles of international laws are particularly relevant to determining the scope of the exclusion power in this respect.

origin. Although arising in the immigration context, the case does not concern decisions by the Government with respect to the admission or exclusion of aliens, but rather, the treatment of unadmitted aliens who are awaiting such decisions. The holding of the court below that discriminatory detention is permissible in this circumstance conflicts both with treaty obligations of the United States and with binding principles of customary international law and should therefore be reversed.

The United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol") is a binding treaty which entered into force for the United States in 1968; self-executing provisions of the treaty specifically prohibit punitive, unnecessary, or discriminatory treatment of refugees. The Court of Appeals, however, failed to examine these prohibitions or to distinguish in any way between refugee and non-refugee Petitioners in the present case.

Moreover, even if the court's broad reading of the discretion enjoyed by the Attorney General were correct as of the 1950's, when the primary cases cited by the court were decided, such discretionary discrimination was subsequently prohibited by the United States' ratification of the Refugee Protocol in 1968.

In addition to the specific prohibitions contained in the Refugee Protocol, the discriminatory detention of the Haitians was prohibited under customary international law -- which, of course, is part of United States law and

> "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

The Paquete Habana, 175 U.S. 677, 700 (1900). See also The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815). Under customary international law, prolonged arbitrary detention and discriminatory incarceration on the basis of race or

national origin are prohibited.[8] In this case, the discriminatory treatment of Petitioners plaintiffs violated these norms of customary international law.

ARGUMENT

I. THE REFUGEE PROTOCOL CONFERS ON REFUGEES SUBSTANTIVE RIGHTS THAT MUST BE GIVEN EFFECT IN THIS CASE.

The United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol"), opened for signature January 31, 1967, entered into force for the United States November 1, 1968, 19 U.S.T. 6223, T.I.A.S. 6577, a treaty to which the United States is a party, prohibits the United States from subjecting refugees who are illegally present in the United States to punitive, unnecessary, or discriminatory

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[8] While there may be an exception to the latter norm where national security is at stake, the Government articulated no national-security interest in the instant case. See supra note 2 and accompanying text.

treatment. The Protocol provisions prohibiting such treatment are self-executing and must therefore be given effect by courts in the United States even in the absence of implementing legislation. Moreover, whether or not the provisions are self-executing, a longstanding rule of statutory construction requires that the statute that allegedly authorizes the Attorney General to detain unadmitted aliens at his discretion be interpreted as not authorizing detention in violation of the United States' obligations under the Protocol.

A. The Refugee Protocol Protects Refugees from Punitive, Unnecessary, or Discriminatory Detention.

Upon adhering to the Refugee Protocol, the United States became obligated to give effect to Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees ("Refugee Convention"), opened for signature

July 28, 1951, entered into force April 22, 1954, 189 U.N.T.S. 137.[9]

Three of the Convention's provisions are particularly relevant here. First, Article 31.1 protects refugees who are unlawfully in the United States from being punished for their illegal entries if they comply with specified requirements. Second, Article 31.2 protects refugees who are unlawfully in the United States from unnecessary restrictions on their movement. Finally, and perhaps most important for purposes of this case, Article 3 prohibits the United States from discriminating on the basis of race, religion, or country of origin in the application of any of the Convention's

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[9] The United States did not become a party to the Convention itself because the Convention was primarily designed to address the post-war refugee problem in Europe. See S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 6, 9 (1968) (statement of Lawrence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State).

other provisions. These three rights will be discussed in turn.

Preliminarily, it should be noted that although most plaintiffs in this case have presented claims for asylum asserting that they are refugees within the meaning of Article 1 of the Convention,[18] United States authorities have not yet adjudicated most of these claims. This fact, however, does not affect Petitioners' entitlement to the protections of the relevant provisions of the Protocol. The protections of the Protocol are not limited to refugees who have been determined to be

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[18] Article 1.A.(2) of the Refugee Convention, as amended by Article 1.2 of the Protocol, defines "refugee" as any person who,

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."

refugees by the authorities of the Contracting State.[11] All applicants for asylum who have demonstrated their prima facie refugee status are entitled to the protections of Articles 3 and 31. See generally Brief of Amnesty International USA in support of Petitioners.

1. The Protocol Prohibits the United States from Imposing Penalties on Refugees for Illegally Entering the Country.

Article 31.1 of the Refugee Convention provides that

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[11] See Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees at 9 (1979):

> "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."

> "contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Most of the Petitioners here came directly from Haiti, were immediately taken into custody, and without delay presented claims for asylum, asserting that they are entitled to refugee status under the Convention and Protocol. Those who can show good cause for their illegal entry are thus entitled under Article 31.1 to be free from the imposition of penalties "on account of their illegal entry or presence."

As this Court has held, a disability imposed for the purpose of punishment constitutes a penalty. See Trop v. Dulles, 356 U.S. 86, 96 (1958). On numerous occasions this Court has elaborated on the meaning of "punishment" in

other contexts.[12] See, e.g., Bell v. Wolfish, 441 U.S. 520, 538-39 (1979); Flemming v. Nestor, 363 U.S. 603, 613-14 (1960). One principle that clearly emerges from this Court's decisions is that treatment imposed by a Government for the purpose of deterring similar conduct by others in the future constitutes punishment and is thus a penalty. As this Court said in Trop v. Dulles, 356 U.S. 86, 96 (1958), "[i]f [a] statute imposes a disability for purposes of punishment -- that is, to reprimand the wrongdoer, to deter others, etc. -- it has been

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[12] The meaning of that term is relevant to determining the applicability of the bill of attainder clause, U.S. Const. art. I, §9, cl. 3, see United States v. Brown, 381 U.S. 437, 447 (1965), the eighth amendment's proscription of "cruel and unusual punishments," U.S. Const. amend VIII, and the procedural protections of the fifth and sixth amendments, see Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). It also plays an important role in due-process analysis, see Bell v. Wolfish, 441 U.S. 520 (1979). See generally Note, Toward a Constitutional Definition of Punishment, 80 Colum. L. Rev. 1667 (1980).

considered penal" (citations omitted; emphasis added).[13]

The record in this case contains overwhelming support for the conclusion that Petitioners were treated as they were primarily in order to deter other aliens from entering the United States illegally. For example, a memorandum from the Attorney General to the President immediately preceding the adoption of the new detention policy urged adoption of the detention option because "[d]etention could deter continuing illegal immigration ..." (Plaintiffs' Exhibits 4 and 5). Similarly, a memorandum issued after the new policy was adopted, entitled "Immigration Detention Policy," states that

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[13] The commentators appear to be in accord on this point. See J. Hall, General Principles of Criminal Law 297-309 (2d ed. 1960); T. Hobbes, Leviathan 238-46 (Oxford ed. 1947); H. Packer, The Limits of the Criminal Sanction 32-33 (1968); Note, Toward a Constitutional Definition of Punishment, 80 Colum. L. Rev. 1667, 1681 (1980).

> "[e]arly in the development of the recommendations of the President's Task Force on Immigration and Refugee Policy, the Attorney General determined that a policy of detention and speedy return of aliens in exclusion status was required to (1) achieve deterrence to counteract continuing illegal alien flows ..."

(Plaintiff's Exhibits 99, 103). Additional evidence of the deterrent purpose of the detention policy abounds.[14]

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[14] Government officials testified that deterrence was a key purpose of the detention policy. For instance, Respondent Alan Nelson justified the detention policy as an effort "to deter and avoid the influx of illegal immigrants." (Tr. 1915). Mr. Giuliani, the Associate Attorney General, admitted that some members of the Task Force conceived the detention policy as in part a deterrent to future illegal immigration. (Tr. 2393). In a statement by Mr. Giuliani to a Congressional Subcommittee, he spoke of the need to discourage illegal aliens from coming to our country, and described the detention policy, together with the interdiction program, as having "deterred many from seeking to enter this country illegally." (Plaintiffs' Exhibit 30, at 18).

Other testimony also supports the conclusion that deterrence was the major aim of the detention policy. Monsignor Walsh testified that government officials told him that "they wanted to send a message ... that people coming in without documentation, even fleeing persecution, that that is not the way to come." (Tr. 270). According to Monsignor Walsh, "[t]heir intention in this policy was to discourage people attempting to come into

(footnote cont'd)

Moreover, two possible non-punitive reasons for keeping refugees detained are unavailable as justifications for the Government's conduct here. Detention would arguably not constitute punishment if its purpose were to protect the national security or to ensure that the unadmitted alien would appear at his exclusion proceeding. The district court in this case, however, specifically found that the plaintiffs posed no threat to the national security and were not likely to abscond. See Louis v. Nelson, 544 F.Supp. 1004, 1006 (S.D. Fla.

(footnote cont'd)
the United States." (Tr. 271). Mr. Hallowell, the Pittsburgh Regional Director from INS, wrote that "it is the intent of the government to exercise further control over the unlawful entry to discourage similar entries in the future." (Tr. 305; Plaintiffs' Exhibit 55F). Larry Mahoney, the public affairs officer for the Department of State Cuban-Haitian Task Force, testified that during meetings with various governmental officials the discussions indicated that deterrence was definitely a factor in the decision to keep Petitioners incarcerated. (Tr. 1158). This substantial testimony was uncontradicted by defendants.

1982).[15] Petitioners have thus at least established a prima facie case that their incarceration constituted a "penalty" in violation of Article 31.1.

2. The Protocol Protects Refugees Unlawfully in the United States from Unnecessary Restrictions on Their Movement.

Article 31.2 of the Protocol prohibits parties from "apply[ing] to the movement of refugees [who have entered illegally] restrictions other than those which are necessary." This prohibition of unnecessary detention did not go unnoticed during the United States Government's deliberations on accession. In fact, it appears to have been considered an important achievement of the Protocol. As one high-ranking Executive official pointed out to

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[15] The apparent absence of a non-punitive justification for the detention distinguishes this case from the cases in which this Court has found the detention of unadmitted aliens not to constitute punishment. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

the Senate during its accession deliberations, "[w]e are all too familiar with the tragic human and political consequences which derive from situations in which refugees are denied [the] fundamental human rights [guaranteed by the Protocol], and instead are kept in camps indefinitely, and are thus committed to dependency and denial of meaningful existence." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 5 (statement of Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State).

The incarceration of Petitioners undoubtedly constitutes a restraint of the severest kind on their freedom of movement. The question whether it violated Article 31.2 turns on whether such an extreme restriction can be considered "necessary." As noted above, the district court found that Petitioners were not security risks and were not likely to abscond. In light of Article 31.1, deterring others from entering

illegally cannot be considered a legitimate ground for the detention of refugees. Respondents failed to justify the incarceration on any other ground. It thus seems clear that the restraint was not "necessary" and that Petitioners' rights under Article 31.2 were violated.

3. The Protocol Prohibits the United States from Discriminating on the Basis of Race or National Origin in Applying its Detention Policy to Refugees.

The third but perhaps most important provision of the Convention is Article 3, which provides simply that "[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." Article 3 thus adds a prohibition of discrimination to the proscriptions of Article 31 just discussed. By virtue of Article 3, in conjunction with Article 31.2, the United States is prohibited from discriminating on the basis of race or national

origin in making detention decisions concerning refugees.

The gravamen of Petitioners' complaint here is that they were subjected to invidious discrimination on the basis of race and national origin by low-level INS employees. The district court concluded that Petitioners had not been subjected to such discrimination, but the Court of Appeals panel reversed as "clearly erroneous" the district court's finding that there was no national origin discrimination (making it unnecessary to reach the issue of racial discrimination). Jean v. Nelson, 711 F.2d 1455, 1494 (11th Cir. 1983). The en banc panel decided that the nondiscrimination provisions of the Constitution do not apply to unadmitted aliens. It failed, however, to consider the nondiscrimination provision of the Refugee Protocol.

In summary, the United States' treatment of Petitioners violated its international

obligations under the Refugee Protocol in three ways. First, in detaining Petitioners for punitive purposes, the United States violated Article 31.1 of the Refugee Convention with regard to those Petitioners who are refugees. Second, because the only purpose served by the detention of those petitioners was an illegitimate one, the United States violated Article 31.2's proscription of unnecessary detention. Finally, the United States' detention of those petitioners in a discriminatory fashion violated Article 3's nondiscrimination provision.

B. The Protocol Is Self-Executing and Must Therefore Be Applied by Courts in the United States Even in the Absence of Implementing Legislation.

The previous section has established that the Protocol imposes an international obligation on the United States not to punish refugees for their illegal entry into the United States, not to impose unnecessary restrictions on the freedom of movement of refugees who have

entered the country illegally, and not to discriminate on the basis of race or national origin in applying any detention policy to refugees. Not all treaty provisions that impose international obligations on the United States, however, are necessarily effective for domestic legal purposes. Some treaty provisions require implementation by legislation in order to become the "law of the land" that must be "faithfully executed" by the President, U.S. Const. art. II, sec. 3, and applied by domestic courts pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). See generally L. Henkin, Foreign Affairs and the Constitution 156-67 (1972). Such treaty provisions are considered "non-self-executing." Other treaty provisions -- labeled "self-executing" -- become the "law of the land" without the necessity of implementing legislation. Self-executing treaty provisions and federal

statutes are of equal authority. Head Money Cases, 112 U.S. 580, 598-99 (1884). In the case of a conflict, therefore, the later in time prevails. Cook v. United States, 288 U.S. 102 (1933).

1. The Legislative History to the United States Accession to the Refugee Protocol and Subsequent Administrative Practice Demonstrate that the Provisions of the Convention Conferring Rights on Refugees Are Self-Executing.

Whether a treaty provision requires implementing legislation to be effective as internal law is a question of domestic law.

> "[T]he intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementing legislation. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement."

Restatement of Foreign Relations Law of the United States (Revised) §131 Comment h (Tent. Draft No. 1, 1980).

Although the texts of the Refugee Protocol and the Refugee Convention do not expressly state whether the provisions discussed above are to be considered self-executing, statements appearing in the legislative history of the United States accession to the Protocol establish very clearly that those provisions were not thought to require implementing legislation to be effective as domestic law.

Specifically, President Johnson, in transmitting the Protocol to the Senate for its advice and consent, described the Protocol as "a comprehensive Bill of Rights for refugees fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties." Message from The President of the United States transmitting the Protocol Relating to the Status of

Refugees, S. Exec. K, 90th Cong., 2d Sess. iii (1968). The President said that the Protocol confers on refugees "humanitarian rights" and "a number of other specific guarantees" in order to "enable them to cease being refugees, and instead to become self-supporting members of free societies, living under conditions of dignity and self-respect." Id. These and numerous other references in the legislative history to the "rights" created by the Protocol[16] plainly establish the understanding of the United States that the Protocol conferred substantive rights directly on refugees --

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[16] See, e.g., Letter of Secretary of State Rusk to President Johnson submitting the Protocol Relating to the Status of Refugees, S. Exec. K, 90th Cong., 2d Sess. v (1968) ("[The Refugee Convention] constituted the most comprehensive codification of the rights of refugees so far attempted on an international level."); S. Exec. Rep. No. 14, 90th Cong., 2nd Sess. 4 (1968) (testimony of Lawrence A. Dawson, Acting Deputy Director, Officer of Refugee and Migration Affairs) ("The protocol is a human rights document."); id. at 6 (Statement of Lawrence A. Dawson) ("[T]he Protocol deals entirely in the sphere of standards of protection and rights for refugees.").

persons who, after all, could hardly be expected to rely on their countries of origin to take up their causes at an international level.

The legislative history also contains numerous statements to the effect that the Protocol required no change in existing immigration legislation, notwithstanding the acknowledged fact that the provisions of that legislation were not identical in every respect to the provisions of the Protocol and the Convention.[17] References in such statements to the Attorney General "enforcing" and "implementing" the Protocol[18] suggest strongly that the Protocol

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[17] See, e.g., Statements of Lawrence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State, and Eleanor McDowell, Office of the Legal Adviser, Department of State, S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 8 (1968).

[18] See Statement of Eleanor McDowell, Office of the Legal Advisor, Department of State, S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 8 (1968) ("We are assured by the Justice Department that [it] is their view ...

(footnote cont'd)

was thought to be effective as domestic law, and not that it was simply hoped or expected that the Attorney General would act consistently with the Protocol though not legally required to. The accuracy of the latter conclusion is confirmed by the repeated statements in the legislative history to the effect that the Protocol conferred "rights" and "guarantees." See supra this Part. The Protocol's protections, after all, could hardly have been

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[t]hat the existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of this Convention which are not presently contained in the Immigration and Nationality Act."); Letter of Secretary of State Rusk to President Johnson submitting Protocol Relating to the Status of Refugees, S. Exec. K, 90th Cong., 2d Sess. at viii (1968) ("[Article 33 of the Convention, prohibiting the expulsion or return of a refugee to any country in which his life or freedom would be threatened,] is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. Section 1254, and it can be implemented within the administrative discretion provided by existing regulations."). See also Statement of Eleanor McDowell, supra ("[Statutory provisions authorizing deportation where the Protocol would prohibit it] would not be enforced against refugees if the protocol were in force.").

considered "rights" if their enforceability had been thought to turn entirely on the will of the Attorney General. See The Western Maid, 257 U.S. 419, 433 (1922) (Holmes, J.) ("Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.").[19]

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[19] The legislative history also contains numerous statements to the effect that the Refugee Protocol was largely consistent with existing statutes. Citing one such statement, this Court recently concluded that accession to the Protocol "did not work a substantial change in the law." Immigration and Naturalization Service v. Stevic, ___ U.S. ___, 104 S.Ct. 2489, 2500 n.22 (1984). The legislative history makes it clear, however, that the Senate and the President were aware that there were differences between the Protocol and existing statutes. See statements cited supra note 17. This Court recognized that fact in Stevic as well. 104 S.Ct. at 2500 n.22. Thus, this Court's language quoted above suggests that, as to those points on which the Protocol differed from existing law -- insubstantial though they might be -- accession to the Protocol did work a change in the law. That conclusion is bolstered by the Court's statement, in the paragraph immediately following the language quoted above, that it was contemplated at the time of accession that "to the extent that the Protocol was more generous than the bare text of §243 (h) [of the Immigration and Nationality Act] would necessarily require, the Attorney General would honor the requirements

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That the rights-conferring provisions of the Protocol and Convention were self-executing also appears to have been, at least until recently, the longstanding view of the Executive agencies primarily responsible for applying the immigration laws. The Attorney General's post-Protocol immigration regulations included provisions to the effect that the denial of an asylum application, or the rejection of an asylum request by an INS District Director or by a United States consul at a port of entry, shall not "preclude the alien, in a subsequent

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(footnote cont'd)
of the Protocol and hence there was no need for modifying the language of §243(h) itself." Id. at 2501 n.22.

That the Protocol's prohibition of discriminatory, unnecessary, and punitive detention of refugees was not thought to change United States law substantially should not be surprising. As the legislative history makes clear, it was not the United States' practice at the time of the accession to treat unadmitted aliens the way plaintiffs here were treated. See generally S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 6 (1968) (Statement of Lawrence A. Dawson); cf. Jean v. Nelson, 711 F.2d 1455, 1468-69 (11th Cir. 1983) (discussing United States parole policy prior to 1981).

expulsion hearing, from applying for the benefits of section 243(h) of the [Refugee Act of 1980] and of Articles 32 and 33 of the Convention Relating to the Status of Refugees."[28] The latter language obviously assumes the existence of a domestically enforceable right under Articles 32 and 33 of the Refugee Convention. It has also long been the view of the Board of Immigration Appeals that the Protocol "is self-executing and has the force and effect of an act of Congress." See In re Dunar, 14 I. & N. Dec. 310, 313 (1973). See also Note, The

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[28] See 8 C.F.R. §108.2 (1976) (denial of an asylum application); 8 C.F.R. §§108.3(a) and (b) (1980) (rejection of an asylum request by an INS District Director or by a United States consul at a point of entry). The former regulation was amended in 1979 to provide that a request for asylum made by an alien after commencement or completion of deportation proceedings would be considered a request for withholding or a request to reopen "under section 243(h) of the Act and for the benefits of Articles 32 and 33 of the Convention Relating to the Status of Refugees." 8 C.F.R. §§108.3(a) and (b) (1980).

Right of Asylum Under United States Law, 80 Colum. L. Rev. 1125, 1129 (1980).[21]

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[21] Some lower courts that have considered the question have decided that other provisions of the Convention incorporated by the Protocol are not self-executing. Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982); Pierre v. United States, 547 F.2d 1281, 1287-89 (5th Cir.), vacated on other grounds, 434 U.S. 962 (1977); Haitian Refugee Center, Inc. v. Gracey, No. 84-2270 (D.D.C. Jan. 10, 1985). Those opinions, however, are fundamentally flawed. They rely heavily on statements in the legislative history indicating that the Protocol was largely consistent with existing immigration legislation. The conclusion that such courts have drawn from those statements -- i.e., that, as to those points on which the Protocol and the immigration legislation did differ, accession to the Protocol did not effect a change in domestic law -- is, amici respectfully submit, dead wrong. See supra note 17. The opinions also failed to apply the rules formulated by this Court discussed infra Part I.B.2. In any event, it is clear that "[s]ome provisions of an international agreement may be self-executing and others non-self-executing." Restatement of Foreign Relations Law of the United States (Revised) § 131 Comment h (Tent. Draft No. 1, 1980). Amici also note that a number of lower courts have implied that some provisions of the Protocol are self-executing. See Cariolan v. Immigration & Naturalization Service, 559 F.2d 993, 996-97 (5th Cir. 1977); Ming v. Marx, 505 F.2d 1170, 1171-72 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975); Kan Kam Lin v. Rinaldi, 361 F.Supp. 177, 179 n.1, 183-86 (D.N.J. 1973); aff'd per curiam sub nom. Yu Fung Cheng v. Rinaldi, 493 F.2d 1229 (3d Cir.), cert. denied, 419 U.S. 874 (1974).

2. Articles 3 and 31 of the Convention Are Self-Executing Under the Rules Formulated by This Court.

In cases where the evidence of the United States' intention regarding the self-executing nature of a treaty provision is inconclusive, courts decide the question of self-execution by reference to a rule enunciated by this Court in 1829:

> "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract -- when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). Under that rule and this Court's subsequent refinements, Articles 3 and 31 clearly emerge as self-executing.

The treaty at issue in Foster provided that specified grants of land "shall be ratified and

confirmed to the persons in possession [under specified circumstances]." 27 U.S. (2 Pet.) at 309. This Court determined that the provision was not self-executing because it employed "the language of contract": it promised the performance of an act in the future -- an act, moreover, that "must be the act of the legislature." 27 U.S. (2 Pet.) at 314. That language was contrasted with language purporting to "act[] directly on the subject." Id. From the Court's distinction in Foster there has evolved the general rule that "[a] treaty ... is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." Head Money Cases, 112 U.S. 580, 598-99 (1884) See also Restatement of the Foreign Relations Law of the United States (Revised) §131 Reporter's Note 5 (Tent. Draft No. 1, 1980) ("Agreements which can be readily given effect by executive and judicial bodies,

federal or state, without further federal legislation, are deemed self-executing, unless a contrary intention is manifest.").

Application of this Court's teachings compels the conclusion that Articles 3 and 31 of the Convention are self-executing. The provisions in terms directly prohibit specified conduct. Article 31.1, for example, provides that parties "shall not impose penalties ...," not that parties "shall enact legislation prohibiting its officers from imposing penalties...." Because they directly prohibit specified conduct, those provisions are examples of the type of rule that can most readily be given effect by executive and judicial bodies without further legislation. The provisions not only do not require further action, they prohibit it. Indeed, this Court has never before found a treaty provision prohibiting specified conduct not to be self-executing.

By directly prohibiting specified conduct on the part of the Government, Articles 3 and 31 confer on refugees corresponding rights to be free from such conduct. This Court has generally found treaty provisions conferring rights directly on foreign nationals self-executing.[22] Moreover, because the rights they confer are defined by the prohibition of conduct, Articles 3 and 31 state the type of rule by which

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[22] See, e.g., Kolovrat v. Oregon, 366 U.S. 187 (1961) (treaty assuring aliens the right to inherit property in the United States); Clark v. Allen, 331 U.S. 503 (1947) (treaty assuring aliens the right to inherit property in the United States); Neilson v. Johnson, 279 U.S. 47 (1929) (treaty assuring aliens the right to inherit property in the United States); Asakura v. Seattle, 265 U.S. 332 (1924) (treaty granting aliens equal right to engage in trade); United States v. Rauscher, 119 U.S. 407, 418 (1886) (alien extradited to United States invoked treaty limitations); Chew Heong v. United States, 112 U.S. 536 (1884) (treaty assuring alien right to leave country and return); Hauenstein v. Lynham, 100 U.S. 483 (1879) (treaty assuring aliens the right to inherit property in the United States); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813) (treaty protecting British property owners from Virginia forfeiture); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (treaty protecting British creditors from cancellation of their debts by Virginia).

private rights can most easily be determined under the rule of the Head Money Cases, supra.

Finally, in their unqualified prohibition of conduct and their creation of corresponding rights to be free from that conduct, Articles 3 and 31 differ sharply from Article 34 of the Refugee Convention, the language of which this Court recently found to be "precatory and not self-executing." Immigration and Naturalization Service v. Stevic, ___ U.S. ___, 104 S.Ct. 2489, 2500 n.22 (1984).[21] Article 34 provides in full as follows:

> "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

(emphasis added). Both in its qualifying language and in its express requirement of

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[21] As amici have already noted, see supra note 21, some provisions of an international agreement may be self-executing and others non-self-executing.

further conduct on the part of the Government, Article 34 typifies the category of treaty provision which this Court has always considered non-self-executing. Articles 3 and 31, by contrast, exemplify the type of provision which this Court has consistently considered self-executing -- and they must thus be applied in this case.

C. The Statute Conferring Discretion on the Attorney General to Deny Parole Should Not Be Read to Authorize Denials of Parole that Would Place the United States in Default of Its International Obligations.

Since the days of Chief Justice Marshall, this Court has maintained that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains...." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). In Lauritzen v. Larsen, 345 U.S. 571 (1953), this Court reaffirmed this "long-heeded admonition of Mr. Chief Justice Marshall." 345

U.S. at 578. See also MacLeod v. United States, 229 U.S. 416, 434 (1913); Restatement of the Foreign Relations Law of the United States (Revised) §134 (Tent. Draft No. 1, 1980) ("Where fairly possible, a United States statute should be construed so as not to bring it into conflict with international law or an international agreement of the United States.").

If the statute which allegedly authorizes the Attorney General to grant or deny parole at his discretion[24] were interpreted to permit detention of refugees in situations where it would be prohibited by the Protocol, it would authorize conduct that would constitute a

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[24] That statute provides, in pertinent part, that

> "[t]he Attorney General may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States."

8 U.S.C. §1182(d)(5)(A) (1982).

breach by the United States of its international obligations. Because there is certainly no indication in the legislative history of that statute that Congress intended to authorize the Attorney General to cause violations by the United States of its international obligations, the statute should be read to authorize denials of parole only when continued detention would be consistent with the United States' obligations under the Protocol.

II. PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW PROTECT PETITIONERS FROM THE TYPE OF TREATMENT TO WHICH THEY WERE SUBJECTED.

A rule need not be expressed in treaty form to be considered a binding rule of international law. Another source of international law is "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, Art. 38(1)(b), 59 Stat. 1055, 1060, T.S. No. 993 (1945). Such customary international law is

applicable in courts of the United States "[w]here there is no treaty and no controlling executive or legislative act or judicial decision ..." The Paquete Habana, 175 U.S. 677, 700 (1900). The norms of customary international law, which are binding on all nations,[25] are evidenced by treaties, international conventions, actual state practice, and the works of jurists and commentators in the field. See id.; Filartiga v. Pena-Irala, 630 F.2d 876, 880-884 (2d Cir. 1980).

It is now settled that customary international law protects certain fundamental human rights from governmental invasion. The United Nations General Assembly has declared that the principles of the Charter of the United

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[25] Customary international law binds all nations rather than only the parties to a particular treaty. Lillich, The Role of Domestic Courts in Enforcing International Human Rights Law, in Guide to International Human Rights Practice 232 (H. Hannum ed. 1984); see The Paquete Habana, 175 U.S. 677 (1900).

Nations[26] embodied in the Universal Declaration of Human Rights[27] "constitute basic principles of international law" (G.A. Res. 2625 (XXV) (Oct. 24, 1970), and the United States has explicitly recognized this principle.[28] In addition, courts[29] and international law

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[26] Signed June 26, 1945, entered into force October 24, 1945, 59 Stat. 1031, T.S. No. 993.

[27] General Assembly Resolution 217A (III) (Dec. 10, 1948).

[28] "The existence of ... fundamental human rights for all human beings, nationals and aliens alike, and the existence of a corresponding duty on every state to respect and observe them, are now reflected, inter alia, in the Charter of the United Nations, the Universal Declaration of Human Rights, and portions of the International Covenant on Civil and Political Rights ...." Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings (United States Diplomatic and Consular Staff in Tehran) 181 (Memorial dated January 1980). See also Memorandum for the United States as amicus curiae at 9, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), reprinted at 19 Int'l L. Mats. 1568, 1593 (May 1980).

[29] See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (right to be free from torture); Fernandez v. Wilkinson, 505 F.Supp. 787, 797 (D. Kan. 1980), aff'd sub nom. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (right to be free from arbitrary detention).

scholars[38] agree that many fundamental human-rights obligations are now binding principles of customary international law.

Even where a specific international human rights obligation has not ripened into a binding rule of customary internatinoal law, it may be used to inform United States constitutional and statutory analysis. In particular, the standards embodied in international human rights instruments and practices are relevant to ascertaining the "evolving standards of decency" central to interpretation of the due

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[38] See, e.g., M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order 273-74, 325-27 (1980) (arguing that all of the rights set forth in the Universal Declaration are customary international law); Lillich, The Role of Domestic Courts in Enforcing International Human Rights Law, in Guide to International Human Rights Practice, 232 (H. Hannum, ed. 1984); Nayar, Human Rights: The United Nations and United States Foreign Policy, 19 Harv. Int'l L. J. 813, 841 (1978).

process and equal protection guarantees of the United States Constitution.[31]

A. The Government's Treatment of the Petitioners Violated the Prohibition Under Customary International Law Against Prolonged Arbitrary Detention.

"No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981). This principle has been cited in every comprehensive interna-
tional human rights agreement since the Second

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[31] See Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981); Lareau v. Manson, 507 F.Supp. 1177, 1187-89 & n.9 (S.D.N.Y. 1980); Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analyses, 52 U. Cin. L. Rev. 3 (1983); Christensen, The Use of Human Rights Norms to Inform Constitutional Interpretation, 4 Hous. J. Int'l L. 39 (1981); cf. Estelle v. Gamble, 429 U.S. 97, 103-04 and n.8 (1976) (citing the United Nation's Standard Minimum Rules for the Treatment of Prisoners as evidence of "contemporary standards of decency" for purposes of the Eighth Amendment).

World War.[33] Restatement of the Foreign Relations Law of the United States (Revised) §702, Reporters' Note 6 (Tent. Draft No. 3, 1982). Moreover, it appears to have been accepted as a binding international norm by virtually all of the nations of the world. Id. at §702, Reporters' Note 1. It has been invoked successfully in numerous cases in which a State has been held responsible for acts constituting arbitrary detention. See, 1 M. Whiteman,

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[33] See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948): Art. 3 ("Everyone has the right to life, liberty, and the security of person.") and Art. 9 ("No one shall be subject to arbitrary arrest, detention or exile."); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368 (1967): Art 9(1) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention...."); and American Convention on Human Rights, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, doc. 65, Rev. 1 Corr. 1 (1970), reprinted in 9 I.L.M. 99 (1970): Part I, ch. II, Art. 7(1) ("Every person has the right to personal liberty and security.") and Art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment.").

Damages in International Law 287 et seq. (1937). In addition, the principle has received broad recognition among legal scholars. See, e.g., 1 Oppenheim's International Law 688-89 (Lauterpacht ed. 1955); L. Sohn & T. Buergenthal, The International Protection of Human Rights 82-83 (1973); and L. Henkin, The Rights of Man Today 89-101 (1978). Thus, the prohibition against prolonged arbitrary detention is firmly grounded in all of the traditional sources of customary international law set out by Justice Gray in The Paquete Habana, 175 U.S. 677, 700 (1900). See also United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); and Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

This right -- the right to be free from prolonged arbitrary detention -- is not dependent upon an individual's immigration status under a country's domestic laws. Every human being is protected, citizen and alien alike.

As the United States recently argued before the International Court of Justice:

> "Whatever the outer limits of the law may be [with respect to an internationally recognized minimum standard of treatment for all aliens], it is well established that, at its core, it means that aliens are entitled to be free from arbitrary or discriminatory arrest and detention and must not be treated in a cruel, inhuman or degrading manner."

Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings (United States Diplomatic and Consular Staff in Tehran) 181 (Memorial dated January 1980). Under customary international law even excludable aliens have a right to be free from arbitrary detention. Fernandez v. Wilkinson, 505 F.Supp. 787, 795-98 (D. Kan. 1980), aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

Detention is arbitrary under customary international law if "it is not pursuant to law, [and it] may also be arbitrary if 'it is incompatible with the principles of justice or

with the dignity of the human person.'" Restatement of the Foreign Relations Law of the United States (Revised) §702, Comment g (Tent. Draft No. 3, 1982), quoting Statement of U.S. Delegation, 13 GAOR C.3 (863d meeting), A/C.3/SR.863 at 137 (1958). In other words, "[d]etention is arbitrary if it is unlawful or unjust." Id. at §702, Reporters' Note 6.

In the instant case, Petitioners were incarcerated for extended periods under harsh conditions because of their race and national origin. As previously noted, Government officials have failed to allege that national security or any other legitimate state interest was served by the discriminatory treatment accorded the Haitians. Moreover, the discriminatory treatment was neither ordered nor authorized by the Attorney General or any other senior official of the executive branch. In such circumstances, the discriminatory detention can only be regarded as unlawful and unjust and hence

"arbitrary." It violated one of our most fundamental principles of justice -- the basic equality of all human beings.[33] See, e.g., The Declaration of Independence para. 1 (U.S. 1776).

Since the discriminatory incarceration of the Haitians was both unlawful and unjust, the Court of Appeals erred in failing to find that it violated customary international law. The en banc decision should therefore be reversed. In the alternative, this Court should reverse the en banc decision on the ground that the arbitrary detention of the Haitians was an abuse of the discretionary parole authority which the Attorney General had delegated to the INS inspectors. See Murray v. Schooner

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[33] As discussed infra at pp. 55-57, this concept has now ripened into a customary international norm proscribing systematic discrimination on the basis of race or national origin. However, even in the absence of such a binding international norm, this Court could determine that the discriminatory treatment in this case was "unjust."

Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remans....").

B. The Government's Discriminatory Treatment of the Petitioners Violated Principles of Customary International Law Prohibiting Discrimination on the Basis of Race or National Origin.

The right to be free from governmental discrimination on the basis of race and/or national origin, like the prohibition of arbitrary detention, is so universally accepted by nations as to fall within those core human rights protected by customary international law. Article 2 of The Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), sets forth a basic guarantee of rights and freedoms "without distinction of any kind, such as race ... [or] national or social origin." The prohibition of such discrimination is included in every comprehensive

international human rights treaty and convention.[34] The renunciation of discrimination is reflected as well in the laws and constitutions of a majority of nations.[35] The United States has expressly recognized the right of all human beings to equal protection against governmental discrimination on the basis of, inter alia, race or national origin.[36] This right is recognized in decisions of the International Court of Justice[37] and in writings of interna-

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[34] See authorities cited in n.39, infra.

[35] H. Santa Cruz, Racial Discrimination, U.N. Doc. E/CN. 41 Sub. 2/307/Rev. 1, 28 (1971); see South West Africa Cases (Second Phase), 1966 I.C.J. 4, 299 (Tanaka, J., dissenting).

[36] Memorial of the United States (U.S. v Iran), 1980 I.C.J. Pleadings 181 n.3 (United States Diplomatic and Consular Staff in Tehran) (Memorial dated January 1980) (citing Article 7 of the Universal Declaration (equal protection against discrimination) as evidence of the core human rights protected by international law).

[37] See Advisory Opinion on the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16,57 (U.N. charter signatories have pledged "to observe and respect ... human rights and fundamental freedoms

(footnote cont'd)

tional law scholars.[38] These sources indicate that the right to be free from governmental discrimination on the basis of race or national origin encompasses at the very least freedom from discriminatory governmental deprivations of liberty.[39]

(footnote cont'd)

for all without distinction as to race. To establish instead, ... distinctions ... exclusively based on grounds of race ... or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."); South West Africa Cases (second phase) 1966 I.C.J. 4,284 (Tanaka, J., dissenting).

[38] See, e.g., M. McDougal, H. Lasswell, & L. Chen, Human Rights and World Public Order 581-611 (1980); Lillich, The Role of Domestic Courts in Enforcing International Human Rights Law, in Guide to International Human Rights Practice 227 (H. Hannum, ed. 1984). See generally W. McKean, Equality and Discrimination Under International Law (1983).

[39] E.g., U.N. Charter art. 55(c) (U.N. shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948): Art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race ...
(footnote cont'd)

The discrimination against Haitians found by the panel -- a deprivation of liberty based on

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(footnote cont'd)
national or social origin, ...), Art. 3 ("Everyone has the right to life, liberty, and security of person") and Art. 7 ("All are entitled to equal protection against any discrimination in violation of this Declaration ..."); European Convention on Human Rights, 213 U.N.T.S. 221 (1950): Art. 5 (right to liberty) and Art. 14 (enjoyment of rights set forth "shall be secured without discrimination on any ground such as ... race, ... national or social origin ..."); International Covenant on Civil & Political Rights, G.A. Res. 2000A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368 (1967): Art. 2(1) ("Each State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, ... national or social origin, ...) and Art. 9(1) ("Everyone has the right to liberty and security of person .... No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law); United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted Nov. 20, 1963, G.A. Res. 1904, 18 U.N. GAOR Supp. (No. 15) 35, 36, U.N. Doc. A/5515 (1963): Art. 1 (discrimination on the ground of "race, colour, or ethnic origin" is an "offense to human dignity" and a "violation of the Universal Declaration); International Covention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 Art. 2 (policy of eliminating racial discrimination in all its forms), Art. 1, para. 1 (racial discrimination defined to include discrimination on basis of national origin) and Art. 1, para. 2 (Convention not to
(footnote cont'd)

national origin -- clearly falls within the international prohibition of governmental discrimination on the basis of race or national origin. The Court should accordingly reverse the court below on the ground that the Fifth Amendment of the United States Constitution, as interpreted in light of the norms of international law, prohibits discriminatory detention of excludable aliens. Alternatively, this Court should hold that the discriminatory detention of the Haitians is an independent violation of customary international law.

(footnote cont'd)
affect nationalization, citizenship or immigration laws provided that such laws "do not discriminate against any particular nationality").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the en banc panel of the Eleventh Circuit.

Respectfully submitted,

*Roberts B. Owen
O. Thomas Johnson, Jr.
David R. Grace
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Of Counsel:

Hurst Hannum
Richard B. Lillich
Procedural Aspects of International Law Institute
1346 Connecticut Ave., N.W.
Suite 1027
Washington, D.C. 20036
(202) 293-1008

Jerome J. Shestack
International League for Human Rights
236 East 46th Street
New York, New York 10017
(212) 972-9554

David Carliner
Amy Young
International Human Rights Law Group
1346 Connecticut Ave., N.W.
Suite 502
Washington, D.C. 20036
(202) 659-5023

Sara Wunsch
Frank E. Deal
Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

January 17, 1985

* Counsel of Record

AMICUS CURIAE

BRIEF

No. 84-5240

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, *et al.*,

Petitioners,

vs.

ALAN C. NELSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS SUBMITTED BY THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN LAW CAUCUS, INC., THE CAMBRIDGE HAITIAN AMERICAN ASSOCIATION, INC., CENTRO PRESENTE, INC., THE CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA, THE HISPANIC NATIONAL BAR ASSOCIATION, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, INC., THE UNITARIAN UNIVERSALIST SERVICE COMMITTEE, AND THE WILLAMETTE VALLEY IMMIGRATION PROJECT

Counsel of Record:
LINTON JOAQUIN
Attorney for Amici Curiae
14 Beacon Street, Suite 407
Boston, Massachusetts 02108
(617) 227-9727

Of Counsel:
GILBERT PAUL CARRASCO

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INTEREST OF *AMICI CURIAE*

The *amici curiae* identified below submit this brief as *amici curiae* in support of petitioners pursuant to Supreme Court Rule 36., urging reversal of the decision of the court below.

The Asian American Legal Defense and Education Fund ("AALDEF") is a national civil rights organization that addresses critical problems of the Asian American communities mainly composed of Asian immigrant families. The defense of immigrant rights is a current program priority for AALDEF which opposes discrimination based on race and national origin.

The Asian Law Caucus, Inc. is a non-profit corporation established under the laws of the State of California in 1972. It was formed to assist Asian Americans in the greater San Francisco Bay Area to protect their rights in employment, housing, immigration, government benefits, and criminal justice, and to provide them with legal and educational services. The organization has been involved in issues which affect the rights of all immigrants.

The Cambridge Haitian American Association, Inc. is a non-profit social service agency offering free help to Haitian immigrants and refugees. Among the services offered to Haitians in the Greater Boston area are the following: immigration counseling and referral, employment support and job search, English as a second language, interpretation services, and document translations. Its entire clientele is Haitian.

Centro Presente, Inc. of Cambridge, Massachusetts, is a non-profit, tax-exempt refugee center which provides legal services to indigent asylum seekers.

The Chicago Religious Task Force on Central America ("CRTFCA") is an interfaith religious solidarity organization founded in January 1981 to organize people of all religious persuasions to respond to the suffering poor in Central America. Its task is to inform, educate and activate people on conditions in Central America. CRTFCA is composed of individual and organizational membership, including American Friends Service

Committee, Clergy and Laity Concerned, National Assembly of Religious Women, Eighth Day Center for Justice, Chicago Catholic Women, National Coalition of American Nuns, Central America Task Force of the Presbytery of Chicago, Unitarian Universalist Service Committee and a variety of congregational committees.

The Hispanic National Bar Association is a non-profit organization founded in 1972 to promote social, economic, and educational equity for all people. It is comprised of affiliated local associations and individuals, both Hispanic and non-Hispanic.

The National Immigration Project of the National Lawyers Guild, Inc. is a non-profit organization of lawyers, legal and community workers dedicated to the protection of immigrants' rights in the United States. Since its inception in 1971, the National Immigration Project has taken special interest in the representation of applicants for political asylum to ensure that they will receive fair and equal treatment under the law.

The Unitarian Universalist Service Committee is an established social action agency committed to economic development and social change in the Third World. Its programs, including eighteen years of community health work in Haiti, are rooted in and inspired by liberal religious principles which affirm the supreme worth and dignity of every person, the interdependence of all people, and each person's right to peace, justice and freedom. The Service Committee works within a broad framework of human rights and sees the connections between social, economic, political and civil rights in all countries.

The Willamette Valley Immigration Project in Woodburn, Oregon, is a non-profit community-based organization active in legal defense of Spanish-speaking non-U.S. citizens with immigration problems. The organization and staff have been certified under 8 C.F.R. § 292 to conduct representation in immigration matters as non-attorneys since July 1, 1977.

SUMMARY OF ARGUMENT

The statements in the decision of the court below that imply that the President has both statutory and inherent, extra-constitutional powers over immigration which would permit invidious discrimination in the incarceration of excludable aliens, unchecked by the Constitution, are dangerous and erroneous *obiter dicta*. As *obiter dicta* the proposition played no role in the decision because only actions of low-level officials were involved and these actions were in direct conflict with the President's publicly proclaimed non-discriminatory policy.

The doctrine that the President has inherent, extra-constitutional power over immigration is at war with our constitutional scheme. Even assuming that the President has such powers over immigration and that they had been implicated in this case, such powers, as are all Presidential powers, are limited by the Constitution, including the Bill of Rights. Thus, even if the President had authorized the invidiously discriminatory incarceration of the black Haitian refugees who are petitioners in this case, such actions would have been subject to constitutional scrutiny under the equal protection guarantees of the fifth amendment. Furthermore, as even the lower court recognized, the President's powers over immigration are limited by congressional power.

ARGUMENT

I.

THE DOCTRINE THAT THE PRESIDENT HAS INHERENT AND STATUTORY POWER OVER IMMIGRATION PERMITTING DISCRIMINATORY INCARCERATION OF BLACK HAITIAN REFUGEES UNCHECKED BY ANY CONSTITUTIONAL SCRUTINY IS DANGEROUS *OBITER DICTA*

Notwithstanding the findings by the Eleventh Circuit panel that overwhelming and unrebutted evidence demonstrated a stark pattern of invidious discrimination by low-level officials, *Jean v. Nelson*, 711 F.2d 1455, 1483-1502 (11th Cir. 1983), which

the *en banc* court neither questioned nor disturbed, *Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984) (*en banc*), the lower court declined to subject the actions of these low-level officials to *any* constitutional scrutiny. *Id.* at 978. In reaching this unprecedented decision, the *en banc* court stated that the President had inherent, extra-constitutional powers over immigration, *id.* at 963-967, and statutory powers under the Immigration and Nationality Act ("INA"), *id.* at 965-67, 978, which were not limited by the Constitution. The court below declared that

> The Executive has two sources of authority in this area: (1) power delegated by Congress through statutes such as the INA and (2) its inherent power, arising out of the Executive's plenary authority over foreign relations.[*] *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S. Ct. 309, 312, 94 L. Ed. 317 (1950). Theoretically, the President ha an independent source of power concerning immigration policy, at least with regard to matters that are not the subject of a statutory mandate or an express prohibition.

Id. at 965 (footnote omitted).

This language is *obiter dicta* and, as demonstrated below, erroneous and dangerous *dicta*. First, as the panel opinion makes clear, only the actions of low-level officials were at issue. *Jean v. Nelson*, 711 F.2d at 1470-71. Second, the actions of these low-level immigration officials were in direct conflict with the publicly proclaimed policy of the President and the Attorney General that the new mandatory detention policy should be applied evenhandedly to all aliens seeking asylum. In describing this new policy to the Congress, the Attorney General called for an "evenhanded" rule of detention. *Jean*, 711 F.2d at 1471.

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*As both the district court and the panel found, this case does *not* involve foreign affairs. *Jean*, 711 F.2d at 1478; *Louis v. Nelson*, 544 F. Supp. 973, 996 (S.D. Fla. 1982). In any event, this Court has consistently recognized that even the President's broad powers over the field of foreign affairs must be exercised within the limits of the Constitution. *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981).

The President himself confirmed that administrative action was to be "consistent with fair procedures and our constitution," and "consistent with our values of individual privacy and freedom." Statement of the President, United States Immigration and Refugee Policy, July 30, 1981 at 829. (The Statement is cited in *Jean*, 711 F.2d at 1470-71).*

II.

ALL PRESIDENTIAL POWER IS LIMITED BY THE CONSTITUTION

The assumption by the court below that the President has statutory and "inherent," extra-constitutional power over immigration not limited by the Constitution is at war with our constitutional system of limited, delegated power. It is unsupported by history or precedent. Even if this Court were to hold that such "inherent" powers – not derived from the Constitution – over immigration exist, they are limited, as are all Presidential powers, by the Constitution.**

A. THE EXECUTIVE DOES NOT HAVE "INHERENT," EXTRA-CONSTITUTIONAL POWER OVER IMMIGRATION

The doctrine that the President has "inherent" power over immigration deriving its source solely from our nation's sovereignty rather than from the Constitution, and which is unlimited by the Constitution, is alien to our history, our values and our constitutional system. There is not a scrap of evidence in the text of the Constitution, the records of the Constitutional

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* Congress also required a non-discriminatory policy. In 1965 it abolished the national origin quota system and racial restrictions and prohibited discrimination based on race, sex, nationality, place of birth or place of residence in all immigration matters. Act of October 3, 1965, P.L. 89-236, 79 Stat. 911, 8 U.S.C. § 1152(a) (1982). Furthermore, in 1968, the United States acceded to the United Nations Convention and Protocol Relating to the Status of Refugees, which prohibits discrimination against refugees on the grounds of race or national origin. Art. 3.

** Furthermore, even the lower court conceded that such Presidential immigration powers are limited by statute. *Jean*, 727 F.2d at 965.

Convention or the statements of the Framers of the Constitution that even suggests that the President, or even Congress, has inherent, extra-constitutional power over immigration or over any other field. *See* Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum. L. Rev. 957, 970 n.90 (1982). As Madison explained: "The powers delegated by the proposed Constitution to the federal government are few and defined." *The Federalist*, No. 45, at 292 (Madison) (C. Rossiter ed. 1961). The entire structure of the Constitution shows that it is a document which limits executive power. Indeed, the tenth amendment makes clear that whatever the sovereign power of the nation may be, the only powers which the federal government possesses are those delegated to it by the Constitution and all others are reserved to the states or to the people. U.S. Const. amend. X.

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803), this Court has repeatedly declared that *all* powers of the federal government, whether belonging to the President or to Congress, are derived from the Constitution. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (Black, J.) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source.") (footnote omitted); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution"); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939) ("government derives its authority wholly from powers delegated to it by the Constitution"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (Marshall, C. J.) ("The government, then, of the United States, can claim no powers which are not granted to it by the constitution ....").

Nearly twenty years ago, this Court confirmed this central principle of American constitutional government when it rejected claims that Congress had inherent power independent of the Constitution "as an implied attribute of sovereignty possessed by all nations" to deprive an American citizen of his citizenship without his assent: "Our Constitution governs us and

we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones." *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).*

Although the *nation* may possess certain powers as a sovereign nation, whatever powers the people gave to the federal government were delegated to it by the Constitution. The *federal government* did not receive such powers independently by virtue of the nation's sovereignty. Moreover, to say that the nation must possess the power as a sovereign nation does not answer the question whether the people delegated it to the federal government or reserved it to the States or to the people. Nor does it answer the question whether the people delegated it by the Constitution to Congress or to the President. Only the Constitution can answer these questions. And the Constitution's answer is directly contrary to the *en banc* court's conclusion.

* Indeed, Justices of this Court have reminded us of this essential principle on other occasions. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 195-96 (1963) (Brennan, J., concurring) ("[u]nder our Constitution, only a delimited portion of sovereignty has been assigned to the Government of which Congress is the legislative arm. To say that there inheres in United States sovereignty the power to sever the tie of citizenship does not answer the inquiry into whether that power has been granted to Congress."); *Reid v. Covert*, 354 U.S. 1, 66 (1957) (Harlan, J., concurring in the result) ("To say that the validity of the statute may be rested upon the inherent 'sovereign powers' of this country in its dealings with foreign nations seems to me to be no more than begging the question."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646-47, 649-50 (1952) (Jackson, J., concurring).

B. NO PRECEDENT SUPPORTS THE DOCTRINE THAT THE PRESIDENT HAS CONSTITUTIONALLY UNLIMITED POWER OVER IMMIGRATION

All powers of the federal government, whether exercised by Congress, the courts, the President or, as here, by low-level immigration officials, are limited by the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803) (Marshall, C.J.). None of the cases cited by the court below supports the doctrine that the President has either statutory or extra-constitutional power over immigration which is *unlimited* by the Constitution. Each case involved the power of Congress or the power of the President pursuant to a delegation by Congress to admit or to deny entry to aliens. None involved invidious discrimination or incarceration of aliens. Indeed, in every case involving incarceration of aliens this and other courts have subjected such incarceration to constitutional scrutiny. Even in the midst of the most extreme emergency — war — this Court subjected discriminatory incarceration by the President to strict constitutional scrutiny. *Korematsu v. United States*, 323 U.S. 214 (1944).

Until the unprecedented decision by the court below, no court has ever held that actions by federal government officials were not subject to *some* constitutional scrutiny. Indeed, it is a fundamental principle, as this Court has recognized, that "every . . . governmental power[ ] must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). *Accord Dames & Moore v. Regan*, 453 U.S. 654, 661-62 (1981) (Rehnquist, J.); *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981) (Burger, C.J.). All powers exercised by the political branches, whether by Congress, the President or low-level executive officials, are limited by the Constitution. *Reid v. Covert*, 354 U.S. at 6 ("[The United States] can only act in accordance with all the limitations imposed by the Constitution.") (footnote omitted); *Marbury v. Madison*, 5 U.S. (1 Cranch) at 176-80. Long ago, this Court rejected a similar theory that executive officials during wartime could disregard the Constitution:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. . . .

Ex parte Milligan, 70 U.S. (4 Wall.) 281, 295 (1866).

Furthermore, all powers of the political branches, textual and non-textual, are limited by the Bill of Rights.* Indeed, this Court has consistently rejected claims that the President has constitutionally *unlimited* inherent powers. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).**

Not only did the lower court simply disregard this basic principle, but the cases of this and other courts which it cited simply do not support a doctrine of inherent, extra-constitutional Presidential power over immigration. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); and *Chae Chan Ping v. United States*, (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) all involved the power of Congress, not the President, to admit or exclude aliens. Here, neither the power of Congress, nor the power to admit

*The doctrines of federalism and separation of powers also limit the powers of the political branches. *See* Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum. L. Rev. 957, 971 n.94 (1982).

**Similarly, this Court routinely subjects broad delegations of authority by Congress to the President in the field of foreign affairs to constitutional scrutiny. *Regan v. Wald*, 104 S. Ct. 3026, 3038-39 (1984); *Haig v. Agee*, 453 U.S. 280, 306-10 (1981).

or deny admission is at issue. Nevertheless, this Court has held that even the power of Congress over admission is limited by the Constitution. In *The Chinese Exclusion Case*, this Court declared that Congress "can exclude aliens," but its power was limited by "the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations." 130 U.S. at 604.

In the two cases on which the court below relies most heavily, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the statements about the supposed inherent, extra-constitutional powers of the President were not necessary to the decision and unsupported by any authority. As Justice Jackson recognized, much of the Court's opinion in *Curtiss-Wright* was *dicta* since this Court was interpreting the scope of the President's *delegated* power under a proclamation authorized by a joint resolution of Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring).*

Curtiss-Wright involved the power of the President to act pursuant to a congressional resolution in the field of foreign affairs,** not immigration, and Justice Sutherland's views are unsupported by any precedent whatsoever. His historical and legal analysis has been demolished by subsequent scholarship.*** Furthermore, even Justice Sutherland, at his most expansive,

* The President expressly stated in the proclamation that he was "acting under and by virtue of the authority conferred in me by the said joint resolution of Congress." 299 U.S. at 311-12.

** As both the district court and the panel found, this case does *not* involve foreign affairs. See note * at page 5, *supra*.

*** Berger, *The Presidential Monopoly of Foreign Relations*, 71 Mich. L. Rev. 1, 28-32 (1972); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L. J. 467, 479-90 (1946); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 Yale L. J. 1, 13-20 (1973); Patterson, *In Re The United States v. The Curtiss-Wright Export Corporation*, 22 Tex. L. Rev. 286, 297-308 (1944).

recognized that *every* power exercised by the President "must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. at 320.*

Similarly, the statement in *Knauff* that "the power of exclusion of aliens is also inherent in the executive department of the sovereign," 338 U.S. at 543, was not necessary to the decision since the Attorney General was acting pursuant to a congressionally authorized presidential proclamation of an emergency. Since this presidential proclamation could have been authorized by normal delegation principles, there was no need to search for unprecedented inherent presidential power. Moreover, the cases cited in support of Justice Minton's conclusion involved *congressional*, not presidential, power. In any event, as demonstrated below, subsequent jurisprudence of this Court has squarely rejected the concept of constitutionally unlimited "inherent" presidential power.**

Further, *admission* cases such as *Knauff* and its progeny are irrelevant to invidious discrimination in the incarceration of excludable aliens. Such discriminatory incarceration can have no legitimate relationship to admission decisions made pursuant to facially neutral statutes. This and other courts consistently subject the incarceration of aliens to constitutional scrutiny. *Wong Wing v. United States*, 163 U.S. 228 (1896); *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983); *United States v. Henry*, 604 F.2d 908 (5th Cir. 1979); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982).

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*This Court has consistently recognized that even the President's broad powers over the field of foreign affairs, *not* at issue here, must be exercised within the limits of the Constitution. See note * at page 5.*supra*.

**Only four members of this Court supported this *dictum*. Three Justices dissented and two did not participate.

Even in the most extreme emergency possible, the middle of a world war when the President claimed that the nation faced imminent invasion and sabotage, this Court subjected invidiously discriminatory incarceration on the basis of race and national origin by the President to the strictest constitutional scrutiny. *Korematsu v. United States*, 323 U.S. 214 (1944). *A fortiori*, if even the discriminatory incarceration by the President acting pursuant to his delegated war power is subject to strict constitutional scrutiny, the discrimination against petitioners here by low-level immigration officials acting in defiance of nondiscriminatory presidential and congressional policy must be subject to constitutional scrutiny.

CONCLUSION

For all the foregoing reasons, this Court should reverse the *en banc* decision and expressly reject the lower court's dangerous and erroneous *obiter dicta* concerning supposed inherent, extraconstitutional presidential power over immigration, unlimited by the Constitution, which would permit discriminatory incarceration of black Haitian refugees on the basis of their race and nationality.

Respectfully submitted,

*LINTON JOAQUIN
Attorney for Amici Curiae
14 Beacon Street, Suite 407
Boston, Massachusetts 02108
(617) 227-9727

Of Counsel:

GILBERT PAUL CARRASCO

**Counsel of Record*

AMICUS CURIAE

BRIEF

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No. 84-5240

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF AMNESTY INTERNATIONAL USA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JOAN HARTMAN
PAUL HOFFMAN
DEBORAH PERLUSS
RALPH STEINHARDT

AIUSA LEGAL
SUPPORT NETWORK
633 South Shatto Pl.
Los Angeles, CA 90005
(213) 388-1237
Attorneys for AIUSA

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BRIEF OF AMNESTY INTERNATIONAL USA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

This brief is submitted amicus curiae by Amnesty International USA ("AIUSA"), with the consent of the parties.

AIUSA is one of over 40 national sections of Amnesty International ("AI"), a worldwide human rights organization with over 3,000 local groups and over 500,000 members, subscribers, and supporters in over 150 countries and territories around the world. AI and AIUSA are independent of any government, political grouping, ideology, economic interest or religious creed. AI and AIUSA work to obtain the release of prisoners of conscience-- men and women detained anywhere for their beliefs, race, sex, national origin, language or religion, provided they have not used or advocated violence. AI and AIUSA also work for fair trials for all political prisoners and in opposition to long term detention without trial. AI and AIUSA also oppose the imposition of torture, or other cruel, inhuman or

degrading treatment or punishment, in all cases. For its work, AI received the Nobel Peace Prize in 1977.

AI's International Secretariat in London collects information about the human rights situations in every country in the world on the basis of missions, interviews of officials and private individuals, and a worldwide network of correspondents. This information is disseminated to governments, inter-governmental organizations and the public in reports, interventions and various other other materials. The United States Congress has recognized the integrity of AI's human rights information. See, e.g., International Financial Institutions Act of 1977, 22 U.S.C. 262g.

Although AIUSA is often unable to express an opinion about the validity of

a particular applicant's fear of persecution, the Immigration and Naturalization Service ("INS") and the courts have relied on AI's expertise in assessing the human rights situation in various nations around the world for the purpose of evaluating individuals' requests for asylum in this country. See, e.g., Fernandez-Roque v. Smith, 539 F. Supp. 925 (N.D. Ga. 1982); Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977). AI has specifically prepared materials on current conditions in the Republic of Haiti which provide an essential factual context for this case and which are summarized in Section I, infra.

AI and AIUSA are directly interested in the status and treatment of refugees in the United States. Refugees who are returned to their country of origin are or may become

"prisoners of conscience." Accordingly, AIUSA participated in the legislative process which led to the passage of the Refugee Act of 1980 and has played a supportive role in the litigation of non-refoulement and asylum claims in administrative and court proceedings throughout the United States, including this Court. Immigration and Naturalization Service v. Stevic, No. 82-973 (June 5, 1984).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus, like the en banc Court of Appeals, Jean v. Nelson, 727 F.2d 957, 962 (11th Cir. 1984), accepts the statement of the case offered by the panel, Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), and the District Court, Louis v. Nelson, 544 F.Supp. 973 (S.D. Fla. 1982). AIUSA respectfully

urges this Court (i) to take judicial notice of the widespread violations of internationally recognized human rights in the Republic of Haiti and to recognize the prima facie validity of at least some of the petitioners' claims to be refugees under the Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention"), as incorporated in the United Nations Protocol relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 ("Protocol"); and (ii) to interpret the statutory and constitutional norms at issue in this case consistently with the prohibition against discrimination by race or national origin, as required by the Convention, the Protocol and customary international law.

ARGUMENT

I. THE HUMAN RIGHTS SITUATION IN THE REPUBLIC OF HAITI SUPPORTS THE PRIMA FACIE PRESUMPTION THAT AT LEAST SOME OF THE PETITIONERS ARE REFUGEES.

AI has received regular reports about widespread violations of internationally recognized human rights committed by the government of Haiti both before and after President for life Jean Claude Duvalier took office in 1971.* The extent of these violations suggests that at least some of the Haitians subject to INS detention polices and practices are "refugees"

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* The factual statements in this section are based upon the following AI publications: AI Annual Report (1984), at 165-167; AI Annual Report (1983), at 145-147; AI Annual Report (1982), at 146-148; AI Annual Report (1981), at 157-160; AI Annual Report (1980), at 146-148; AI Annual Report (1979), at 66-67; AI Annual Report (1978), at 125-127; Torture in the Eighties (1984), at 162-163.

within the meaning of the Convention, the Protocol and the Refugee Act of 1980.

The central fact underlying the violation of internationally recognized human rights in Haiti is the suppression of all forms, or even potential forms, of dissent by any group or individual in Haitian society. Over the past decade hundreds of persons have been detained incommunicado by the government because of their political beliefs and peaceful political activities. Since 1980 most opposition lawyers, journalists and intellectuals have been imprisoned or expelled from Haiti. Trade unions are non-existent, and political parties and associations are tightly controlled by the government. Indeed, certain subjects, such as the activities of the Government of Haiti, are prohibited

topics of conversation or publication in Haiti.

There have also been regular reports of torture and ill-treatment inflicted on people from a wide range of sectors of the Haitian population. Torture in the Eighties (1984), at 162. Many people have been detained incommunicado for long periods of time, without access to lawyers, relatives or doctors. Normally arrests of political detainees are accomplished, without arrest warrant, by the "tontons macoutes," an armed militia created by the late president Francois Duvalier to suppress any manifestation of political opposition in the population. When trials of political detainees do occur they have never satisfied minimum international standards of due process.

In sum, in Haiti any deviation from the mandated silent subservience to the Duvalier Government's complete control over all aspects of Haitian life is almost certain to lead to "persecution" within the meaning of the Convention and the Protocol.

II. THE EN BANC COURT OF APPEALS ERRED IN VIEWING THE ATTORNEY GENERAL'S DISCRETION TO GRANT OR DENY PAROLE AS AN ACT OF UNLIMITED SOVEREIGNTY.

The record of human rights violations in Haiti precludes any blanket conclusion that petitioners are not refugees. The appropriate assumption is that at least some of the petitioners are genuine refugees deserving treatment consistent with the Convention and the Protocol. At a minimum, those treaties and principles of international customary law require that the domestic administrative machinery for determining refugee status and for treating refugees be free of discrimination by race or national origin. The Attorney General's statutory discretion to grant parole must be interpreted in light of these international obligations, which under

the Supremacy Clause of the U.S. Constitution, are the supreme law of the land. The en banc Court of Appeals therefore erred as a matter of law in determining

> that the grant of discretionary authority to The Attorney General under 8 U.S.C. § 1182(d)(5)(A) permits the Executive to discriminate on the basis of national origin in making parole decisions.

Jean v. Nelson, 727 F.2d 957, 963 (11th Cir. 1984) (en banc).

A. As a Treaty To Which The United States Is A Party, The Protocol Relating To the Status of Refugees Is The Supreme Law of the Land.

Since 1968, the United States has been a party to the Protocol, which incorporates Articles 2 through 34 of the Convention. Both instruments provide for the humane and non-discriminatory treatment by States Parties of "refugees," i.e., any person who, owing to a well-founded fear of

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to return to his country of nationality of his former habitual residence. Both the Convention and the Protocol require States Parties to provide certain rights and privileges to those who are "refugees." See, e.g., Convention Articles 4, 15, 17, and 20-24 (requiring at least national treatment for refugees with respect to freedom of religion, rights of association, employment, and welfare, respectively).

The most basic of these provisions, contained in Article 3 of the Convention, obliges States Parties to apply all other provisions of the Convention "without discrimination as to race, religion, or country of origin."

Under the Protocol, national security is the only permissible basis for disadvantageous treatment of asylum applicants pending determination of their status as refugees, and then only if "essential to the national security" during times of war or other major emergencies, Convention, Article 9, which is certainly not the case here as found by the courts below. See § II D, infra. Moreover, while Article 31(2) of the Convention permits "necessary" restrictions on the movement of persons presenting asylum claims who have illegally entered the national territory, the Article 3 prohibition of discrimination prevents the imposition of such restrictions on the basis of race and country of origin. Thus, a right to be free from a discriminatory selective restriction attaches to and

distinguishes refugees from the larger classification of illegal entrants.

As a "Treat[y] made ... under the Authority of the United States," these provisions of the Protocol are the "supreme law of the land." U.S. Const., Art VI. Like all treaties, the Protocol qualifies in some measure the sovereignty of the United States. The F.S. Wimbledon [1923] P.C.I.J., ser. A, No. 1, 24, 25. In this case, at the moment of accession to the Protocol, the United States consensually surrendered its prerogative to discriminate against "refugees" by race or national origin. Moreover, Congress has never cut back on the scope or meaning of the Protocol; indeed, the principles of the Protocol were expressly adopted by the Congress in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, et seq. The

legislative history of that Act shows clearly that Congress intended to conform domestic law with the United States' obligations under the Protocol and to ensure that United States statutes and regulations would be construed in a manner consistent with relevant international norms. See, e.g., H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 17-18 (1979); S. Rep. No. 96-590, 96th Cong., 2d Sess. (1980) at 19-20. Moreover, Congress was conscious of this goal to achieve equality of treatment for all refugees in the asylum process, regardless of country of origin, when it adopted the standards of the Protocol into the Act. S. Rep. No. 96-256, 96th Cong., 1st Sess. 2-3 (1979) As evidence of our "national commitment to human rights and humanitarian concerns, not reflected in the [INA of

1952 as amended]" Congress sought to eliminate the "geographical and ideological restrictions" which had previously characterized American refugee policy, id. at 1, 15; and to establish a "new uniform asylum procedure." H. Conf. Rep. No. 96-781, 96th Cong., 2d Sess. 20 (1980).

With respect to the definition of refugees and the asylum process, the Joint Explanatory Statement of the Committee of Conference stressed its "understanding that [the Act] is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." Id. at 20. As a result, to the extent that the Protocol can be demonstrated to apply to the petitioners, the en banc court erred in concluding that the Attorney General's

discretion to grant or withhold parole is an unlimited exercise of sovereign authority.

B. Petitioners Should Be Treated in Accordance With The Anti-Discrimination Norms of The Protocol And Customary International Law Until They Are Conclusively Determined Not To Be "Refugees."

Although some of the protections assured by the Protocol logically need not be provided until after a particular alien has been determined to be a refugee, amicus submits that the fundamental principle of non-discrimination must apply prior to that time and must govern the administrative process itself. This principle, evident in state practice under the Convention, follows from the nature of the refugee designation and assures the protection of the absolute and non-discretionary entitlement to non-refoulement as

provided in the Convention. It is clear as a first principle that an alien's actual refugee status is analytically and temporally prior to the INS' administrative recognition of that status. According to the Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979), written by the United Nations High Commissioner for Refugees as an authoritative interpretation of states' obligations under the Convention and Protocol, the formal designation of an alien as a refugee is of primarily declaratory not constitutive significance:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him

> to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

Handbook, ¶ 28 (emphasis supplied).*

"'Refugee' is a self-imposed label, not one requiring the imprimatur of the INS." Vigile v. Sava, 535 F. Supp. 1002, 1014 (S.D.N.Y.), rev'd on other grounds, 684 F.2d 204 (2d Cir. 1982). For this reason, aliens with a presumptive or prima facie claim to refugee status must be treated with at least minimal fairness until they are conclusively determined not to be refugees. Report of the 1979 Arusha Conference, Recommendation on the Term

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* The INS and the courts have referred to the UNHCR Handbook as an authoritative interpretation of the United States' obligations under the protocol and the convention. See, e.g., Matter of Rodriquez-Palma, 17 I.& N. Dec. 465 (B/A 1980).

"Refugee" And Determination of Refugee Status, Executive Committee of the High Commissioner's Programme (30th Session), U.N. Doc. A/AC. 96/INF. 158, at 9.

That the provisions of the Convention and Protocol prohibiting discrimination and unnecessary detention were intended to apply during the determination process itself is also evident from the text of the Convention. In three narrow circumstances, not present here, the drafters of the Convention explicitly distinguished between treatment for refugees awaiting determination of their status and that for refugees unlawfully in the country of refuge: (1) Article 9 of the Convention authorizes states parties in time of war or grave and exceptional circumstances to take provisional measures with respect to a particular

individual who may pose a threat to national security pending his determination of status. (2) Article 31 prohibits states parties from imposing penalties on illegal aliens who "present themselves without delay to the authorities and show good cause for their illegal entry or presence;" and (3) Article 32 articulates separate standards governing the expulsion of refugees, depending upon whether the refugee is lawfully or unlawfully present in the country of refuge, a distinction which presumes the completion of at least some administrative procedure.

When the drafters intended to require the initiation or completion of administrative action as a prerequisite for some protection under the Convention, they chose language

making that requirement clear. It is therefore highly significant that the provisions of Article 3, prohibiting discrimination by race or national origin, and Article 31 (2), prohibiting unnecessary restrictions on movement, are not similarly limited expressly to those whose refugee status has been determined. The clear implication is that those protections at a minimum must be applied to all refugees, even those whose status has not been conclusively determined.

Courts of the United States which have addressed the issue have consistently held that aliens awaiting an administrative determination of their refugee status are entitled to raise claims under the Protocol. Fernandez-Roque v. Smith, 91 F.R.D. 117 (N.D. Ga. 1981); Sannon v. United States, 427 F.

Supp. 1270 (S.D. Fla. 1977), vacated and remanded on other grounds, 566 F.2d 104 (5th Cir. 1978); Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980); Chim Ming v. Marks, 505 F.2d 1170 (2d Cir. 1974), cert. denied, 721 U.S. 211 (1975). This presumptive application of the Convention's most basic principles to prima facie refugees is also common as a matter of state practice. The rationale most consistently advanced is that such treatment is appropriate to protect the right under the Convention of genuine refugees to non-refoulement, i.e., the right not to be expelled or returned to the country of origin. Convention, Art. 33(1). Goodwin-Gill, "The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees,"

Transnational Legal Problems of Refugees, [1982] Michigan Yearbook of Int'l Legal Studies 291, at 304 (reviewing state practice in Australia, Belgium, France, Federal Republic of Germany, The United Kingdom, and the United States). Non-refoulement is a non-discretionary entitlement as a matter of international law, 8 U.S.C. § 1253(h),* which, by the international consensus of states, attaches at "the moment at which ... asylum seekers present themselves for entry," i.e., before the formal designation of an alien as a refugee. Goodwin-Gill, supra, at 304.

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* As noted, the Refugee Act of 1980 conformed domestic law to the obligations of the Protocol with respect to non-refoulement. 8 U.S.C. § 1253(h).

The fact that non-refoulement is non-discretionary requires that states utilize no artificial or unlawful criteria in determining who is and who is not a "refugee." If the administrative process for determining refugee status is itself infected with or obstructed by discrimination by race or national origin, genuine "refugees" may not be recognized, leading to treatment which violates the absolute prohibition of non-refoulement. In other words, basic procedural fairness--facial and actual neutrality--is necessary to assure states' full compliance with their sovereign obligation to respect this protectable interest. Yiu Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983). This analysis is familiar in the domestic context of constitutional due process. It is well-

established that a non-discretionary entitlement conferred by law carries with it implicit standards of procedure to assure that it is not unfairly compromised. Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 7 (1979) (parole); Fuentes v. Shevin, 407 U.S. 67, 97 (1972) (pre-judgment attachment); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (tenure). The Protocol and Convention create an analogous entitlement, carrying with it an analogous (if arguably less elaborate) right to have asylum claims treated in accordance with those treaties, pending the final

determination of refugee status.*

C. The Convention, Protocol And Customary International Law Prohibit Discrimination By Race Or National Origin.

1. The Non-Discrimination Norm is the Most Fundamental Principle in the International Law of Human Rights

The non-discrimination norm adopted in Article 3 of the Convention, as incorporated into the Protocol and

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* Amicus' argument is not that petitioners must as a constituional matter be accorded some measure of due process under the Fifth Amendment, nor is it that self-executing provisions of the Convention and Protocol by themselves create enforceable rights that exceed those granted to aliens by the Constitution (although it is consistent with these positions). Rather, amicus submits that the Attorney General in exercising his discretion under the Act must conform to the non-discrimination norm of the Protocol, as incorporated in the Act, and that, as noted above, the interim application of the anti-discrimination principle is logically necessary to assure the protection of refugees' absolute right to non-refoulement.

Refugee Act of 1980 ("Act"), is central to the purposes of the Protocol and should be interpreted in light of the special importance of the non-discrimination norm in international law. The fundamental nature of non-discrimination and equality of treatment as an international obligation was specifically emphasized in the major binding and constitutive instrument of the modern world legal order, the Charter of the United Nations, June 20, 1945, 59 Stat. 1031, T.S. No. 993, Art 1(3), Art. 55(c), as it has been in every subsequent binding international instrument relating to human rights and numerous interpretive resolutions.* An understanding of the norm of non-

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* A compilation of these documents is found in Appendix "A" hereto.

discrimination in international law is crucial for the proper interpretation of the obligation assumed by the United States in ratifying the Protocol and incorporating its standards into domestic law through the Act.

The norm on non-discrimination establishes a central dignitary principle which is at the core of all human rights:

> The most fundamental meaning of human dignity is that individuals are to be regarded and treated as total personalities having their own unique characteristics and potentialities, and are not to be manipulated and managed in mass in terms of putative characteristics assigned through group labels.

M. McDougal, H. Lasswell, and L. Chen, Human Rights and World Public Order 564 (1980). See also Id. at pp. 367-378.

In international law, impermissible

discrimination has been defined in a United Nations Study as:

> ... any conduct based on a distinction made on grounds of natural or social categories which have no relation either to individual capacities or merits, or to the concrete behavior of the individual person.

United Nations, The Main Types and Causes of Discrimination 9, U.N. Doc. E/CN.4/Sub. 2/40/Rev. 1 (1949). The right not to be discriminated against is by nature a procedural right, a right to equality of treatment before the law. The non-discrimination norm in the Protocol and Act therefore sets forth a minimum standard of treatment in the processes relating to the treatment of refugees, especially in relation to applications for asylum.

The non-discrimination norm applies to administrative decisions at all

levels, whether or not the decision is a discretionary one, South West Africa Cases (Second Phase), [1966] I.C.J. 304 (Dissenting Opinion of Judge Tanaka):*

> There is no doubt that the principle of equality is binding upon administrative organs. The discretionary power exercised on considerations of expediency by the administrative organs is restricted by the norm of equality and the infringement of this norm makes an administrative measure illegal.

Therefore, in this case the administrative level at which the discrimination against petitioners was committed is of no relevance and the en banc court erred in remanding the case for further findings. 727 F.2d at 978. Likewise irrelevant are the motivations which may have animated the discriminatory treatment of petitioners, since under the non-discrimination norm in international law, "the question of

intent or governmental discretion is not relevant...." Advisory Opinion on the Legal Consequences For States of the Continued Presence of South Africa in Namibia (South-West Africa) [1971] I.C.J. 16, 57.

2. The Non-Discrimination Norm is Central to the International Law of Protection for Refugees.

The centrality of the non-discrimination norm in the Protocol becomes even clearer when it is seen against the background of traditional international principles governing the treatment of aliens. In international law a state mistreating an alien incurs responsibility to the state of which the alien is a national. The projections for aliens were traditionally enforceable at the behest of the state of nationality. Nottebohm Case

(Liechtenstein v. Guatemala), [1955] I.C.J. 4; 8 M. Whiteman, Digest of International Law 376-382, 1216-1233 (1967)

Refugees do not fit into this traditional structure of diplomatic protection. By definition they are persons who have fled their countries of origin by reason of persecution. They are unable to rely on their countries of origin to assure that they are not abused by the foreign states to which they have fled. P. Weis, "The International Protection of Refugees," 48 A.J.I.L. 193, 199 (1954). This deficiency in the international legal system led to the development of norms for the protection of refugees. Consequently, the Convention and Protocol obligate contracting states to accord equality of treatment to the

otherwise protectionless refugee.*

3. The Non-Discrimination Norm Governs the Administrative Decision to Grant or to Deny Parole to Asylum Applicants.

The executive branch's singling out of Haitians for discriminatory detention, as found by the district court and the panel, see § II D, infra, is the precise conduct which violates even the narrow non-discrimination norm of the Protocol and Act. Whatever limits may be imposed on the detention of aliens by other sources of international law, the Executive is not required by the Protocol to create a system of parole pending determination

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* Likewise, the international law of human rights has created certain minimum guarantees for all persons in every jurisdiction without regard to nationality. See Case Concerning The Barcelona Traction, Light and Power Company (Belgium v. Spain), [1970] I.C.J. 4, 32.

of asylum petitions. However, the Congress chose to grant the Attorney General the discretionary authority to parole any alien pending his exclusion hearing. 8 U.S.C. § 1182(d)(5)(A). The Attorney General is not required by the Protocol to exercise this power. He could, consistently with the Protocol, choose not to parole any aliens whatsoever pending determination of refugee status. Cf Wong Wing v. United States, 163 U.S. 228, 235 (1896). But the 1952 Act gave the Attorney General the discretionary authority to parole any alien pending his exclusion hearing, 8 U.S.C. § 1182(d)(5)(A), a policy praised by this Court as evidencing the "humane qualities of an enlightened civilization." Leng May Ma v. Barber, 357 U.S. 185, 190 (1958). Where the Attorney General chooses to exercise his

authority to grant parole to aliens petitioning for asylum, the one thing the Protocol does mandates is that, in exercising his discretionary authority, the Attorney General must not discriminate on the basis of race or country of origin. The violation of this basic norm of non-discrimination is the essence of this case.

The pivotal nature of the non-discrimination norm in the Protocol and Convention is further supported by the widely recognized principle that the non-discrimination norm "has become a rule of customary international law . . . ." South West Africa Cases, Dissenting Opinion of Judge Tanaka at 293. See Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), [1970] I.C.J. 4, 32 American Law Institute, Restatement of

the Foreign Relations Law of the United States (Revised), Tentative Draft No. 3, Section 702 (1982). Exclusions and restrictions based on race or national origin are "a flagrant violation of the purposes and principles of the [U.N.] Charter." Advisory Opinion (South-West Africa), supra at 57.

The inclusion of both race and country of origin in Article 3 (along with religion) is chiefly explained by the special pertinence of national origin discrimination in the treatment of refugees. However, the link is by no means aberrational in international law. The leading international instrument directed toward the problem of racial discrimination defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, color, descent, or

national or ethnic origin . . . ." International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force January 4, 1969), art. 1(3). Indeed, a major thrust of the Protocol was to generalize the protections enjoyed by limited groups of refugees under the Convention, so that all refugees regardless of nationality could benefit from its procedural and substantive protections. P. Weis, "The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties," [1967] Brit. Y.B. Int'l. L. 39, 43.

D. The En Banc Court of Appeals Should Have Interpreted the Attorney General's Statutory Discretion To Grant Or Deny Parole Consistently With the International Prohibition Against Discrimination By Race or National Origin.

There is no dispute that no other group of asylum applicants was systematically detained like the petitioners. The district court specifically found that the detention policy of the INS had a disproportionate impact on Haitians, in terms of the number of Haitians detained and the length of their detention. 544 F. Supp. at 982. The district court also found that the INS was subjecting Haitians to a "human shell game" by arbitrarily transferring class members around the country to desolate areas without available attorneys or communication facilities. 530 F. Supp. at 924. There is also substantial evidence in

the record suggesting that the prolonged detention policy was intended to discourage other Haitians from coming to the United States and advancing claims for political asylum. See (Plaintiffs' Exhibits "4" and "5") The panel found that virtually all Haitians who arrived in this country were detained, unlike Nicaraguans and others similarly situated who were typically released pending a determination of their admissibility. 711 F.2d at 1490-1494. On these and other grounds, the panel found a "pattern [of discrimination based on nationality] as stark as that of Gomillion [v. Lightfoot, 364 U.S. 339 (1960)] or Yick Wo [v. Hopkins, 118 U.S. 356 (1886)]." 711 F.2d at 1489. Both the district court and the panel specifically found, largely on the basis of the government's own testimcny, that

petitioners' detention was not necessitated by any threat to the national security or the public safety or by any fear that petitioners would abscond, or by any administrative necessity arising out of an unmanageable flow of entrants, 711 F.2d at 1492 n. 38, 544 F. Supp. at 1006, the exceptions historically recognized by the government to the rule of general parole. 32 Int. Rel. No. 12 (March 22, 1954). See Leng May Ma, supra, 357 U.S. at 190.

Although the en banc Court of Appeals held that such discrimination was not unlawful, it nevertheless remanded the case to the district court for a determination

> whether there exists a facially legitimate and bona fide reason for the government's decision to deny parole to the class members presently in detention. ...

727 F.2d at 978. The error of law committed by the en banc court consists in its failure to recognize that the powers of the government to detain aliens or discriminate against certain classes of aliens, 8 U.S.C. § 1225(b)* must be interpreted in light of Article 3 of the Convention, supra, and customary international law.

* 8 U.S.C. § 1225(b) on its face allows the INS to detain some aliens pending exclusion hearings. The district court found that the word "detained" in the statute could simply mean that the alien's "entry into the United States should be delayed until inquiry is made at the exclusion hearing." 544 F. Supp. at 994. Irrespective of its meaning as a matter of domestic law, however, the detention powers cannot be exercised in a manner which discriminates by race or nationality without violating the Convention and Protocol.

It is well established that international law is a principal referent for the interpretation of statutory and constitutional principles. Fong Yue Ting v. United States, 149 U.S. 698 (1893) (international legal principles inform Congress' power of exclusion and deportation of aliens); Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982) ("in an appropriate case, to ascertain what Congress has authorized, one must consider the treaties, agreements, and customary international law to which the United States subscribes, as well as to domestic law.") Accord Bowater S.S. v. Patterson, 303 F.2d 369 (2d Cir.) cert. denied, 371 U.S. 860 (1962) (statutes relating to international matters are construed in accordance with international usage); Rodriquez-

Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981); Sociedad Nacional de Marieneros de Honduras v. McCulloch, 201 F.Supp. 82 (D.D.C.), aff'd, 372 U.S. 10 (1962), vacating 300 F.2d 222 (D.C. Cir.) (any construction of statute which violates principles of international law should be avoided). It is especially appropriate to construe the provisions of the Protocol broadly given the government's interpretation of that agreement as fundamental protection of refugees from indefinite detention and other denials of fundamental rights. See Statement of Laurence A. Dawson, S. Exec. Rep. No. 14, 90th cong., 2d Sess. (1968) at 5:

> We are all too familiar with the tragic human and political consequences which derive from situations in which refugees are denied these fundamental rights, and instead are kept in camps indefinitely, and are

> thus committed to dependency and denial of meaningful existence.

Id. (emphasis supplied).

In this light, the error of the en banc court's cursory dismissal of international law is patent. 727 F.2d at 964 n. 4. There the court announced that

> amici have pointed no evidence in the way of diplomatic protests, international arbitrations, or court decisions that suggest that it is current international practice to regard the detention of uninvited aliens seeking admission as a violation of customary international law.

Id. In its exclusive focus on the issue of arbitrary detention, the en banc court fails to address the discriminatory aspect of the detention, discussed above, and simply assumes, contrary to fact, that the government's policy of detention was facially

neutral. Amicus submits that the unique segregation and detention of petitioners, as found by the panel and the district court, constitutes discrimination within the meaning of Article 3.

It was also error for the en banc court to suggest that the Supreme Court had resolved the international legal issue against petitioners. Neither Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) nor Landon v. Plasencia, 459 U.S. 21 (1982),* on which the en banc court principally relied,

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* Whatever else may be said of this Court's statement in Landon that "the power to admit or exclude aliens is a sovereign prerogative," it cannot be converted into a blanket exemption of the INS' detention policy from the requirements of the Convention and Protocol, which constitute the Supreme Law of the Land. U.S. Const., Article VI, Section 2.

involved discrimination by race or national origin against a class of *prima facie* refugees. '

CONCLUSION

For all of the foregoing reasons this Court should reverse the judgment of the Court of Appeals.

DATED: January 17, 1985

Respectfully submitted,

JOAN HARTMAN
PAUL HOFFMAN*
DEBORAH PERLUSS
RALPH STEINHARDT

ATTORNEYS FOR AIUSA

*Counsel of Record

APPENDIX "A"

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Universal Declaration of Human Rights, adopted Dec. 10, 1948 G.A. Res. 217, U.N. doc. A/810 (1948) arts. 2, 7 14; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) arts. 2(1), 13, 26; International Covenant on Economic, Social And Cultural Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) art. 2(2): Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, art. 3(j); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, held at Bogota, Columbia (1948), OEA/Ser. L./V/I. 4 Rev. (1965) Arts. II, XXCII; American Convention on Human Rights, signed Nov. 22, 1969, OAS Official Records OEA/Ser. K/XVI/i.i, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970) arts. 22(7), 22(9), 24; International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, G.A. Res. 3068, 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9233/Add. 1 (1973); Declaration on Social Progress and Development, adopted Dec. 11, 1969, Arts. 1 and 2, G.A. Res. 2542, 24 U.N. GAOR, Supp. (No. 30) 49, U.N. Doc. A/7630 (1969); Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, adopted Dec. 7, 1965; Principles 1 and 3, G.A. Res. 2037, 20 U.N. GAOR, Supp. (No.14) 40, U.N. Doc.

A/6014 (1965); Employment Policy Convention, adopted July 9, 1964, Art. 1(2)(c), 569 U.N.T.S. 65 (entered into force July 15, 1964); Protocol to the Convention against Discrimination in Education, adopted Dec. 10, 1962, [1969] U.N.T.S. No. 9423 (Cmd. 3894); Convention against Discrimination in Education, adopted Dec. 14, 1960, 429 U.N.T.S. 93, 96 (UNESCO General Conference) (entered into force May 22, 1962); Declaration on the Rights of the Child, Principle 1, adopted Nov. 20, 1959, G.A. Res. 1386, 14 U.N. GAOR, Supp. (No. 16) 19, U.N. Doc. A/4354 (1959); Convention concerning Discrimination in Respect of Employment and Occupation, adopted June 25, 1958, 362 U.N.T.S. 31 (ILO General Conference)(entered into force June 15, 1960); Convention Relating to the Status of Stateless Persons, Art. 3, adopted Sept. 23, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960); Convention on Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, 1950 Europ. T.S. No. 5, 213 U.N.T.S. 221; Convention Relating to the Status of Refugees, adopted July 25, 1951, Art. 3, 189 U.N.T.S. 304 (entered into force May 23, 1953); Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

AMICUS CURIAE

BRIEF

(15)

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In The

Supreme Court of the United States

October Term, 1984

MARIE LUCIE JEAN, et al.,

Petitioners,

v.

ALAN NELSON, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

DONALD L. UNGAR
LAWRENCE N. DICOSTANZO
TERRY J. HELBUSH
BILL ONG HING
KIP E. STEINBERG
SIMMONS & UNGAR
517 Washington Street
San Francisco, CA 94111
(415) 421-0860

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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STATEMENT OF INTEREST

The American Immigration Lawyers Association is a national organization of lawyers who devote special attention to the practice of immigration and citizenship law and therefore have a serious interest in the development of this law. The Association is submitting its brief in support of the petitioners. All parties have consented to the filing of the brief.

—o—

INTRODUCTION

The purpose of this brief is to show that petitioners are not foreclosed by *U.S. ex rel Shaughnessy v. Mezei*, 345 U.S. 206 (1953), from attacking the constitutionality of their detention while awaiting decisions on their applications for asylum in the United States.

This is a crucial issue because the court below, while acknowledging that petitioners had presented a substantial constitutional argument, found nonetheless that it was foreclosed by *Mezei* from ruling in petitioners' favor on that issue. *See Jean v. Nelson*, 727 F.2d 957, 969-75 (11th Cir. 1984).

Contrary to the conclusion of the court below, however, there are two reasons why *Mezei* is or should be held inapplicable to this case. The first is that *Mezei* is distinguishable from the present case. Second, and alternatively, the holding in *Mezei* should be reexamined in its entirety. These positions are discussed in this brief.

—o—

ARGUMENT

I.

The Difference Between Mezei and this Case

The court below found its hands tied by *Mezei* because of two similarities between the present case and *Mezei*. The first was the identity of the specific issue, i.e., validity of the detention of aliens pending their admission into or exclusion from the United States. The second was the legal status of the parties, petitioners being non-resident applicants for admission and Mr. Mezei having been assimilated to that status because of his prolonged absence abroad.

Given those essential determinations, the court below reached the conclusion that, like Mr. Mezei, petitioners have no constitutional rights with respect to their detention. As stated in *Mezei*, due process for non-resident aliens at the border is whatever process Congress has authorized. 345 U.S. at 212, *citing Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). Since Congress had authorized the Attorney General to exclude persons he deemed security risks and to hold them in custody pending their expulsion from the United States, Mr. Mezei's indefinite detention comported with due process. Working from that holding, the court below declared that the detention of the petitioners, occurring in the context of exclusion proceedings created by statute, necessarily comported with due process—even though the detention might be the result of discrimination based on the petitioners' race or national origin.

There is, however, a fundamental difference between this case and *Mezei*, a difference that the court below overlooked. The distinction between the cases involves the

connection between the exercise of the exclusion power granted by Congress and detention. When the detention is necessary to effect the power to exclude—as in *Mezei*—one might agree that the detained alien only has such rights as Congress gives him. However, when the detention of an alien is not related to the power to exclude—as in this case—then the detained alien has constitutional rights relative to the detention to protect against arbitrariness and to assure that government officials are acting within the scope of the authority delegated to them. This is explained more fully as follows:

The Attorney General deemed Mr. Mezei to be a security risk and therefore barred his return to the United States. Because no other country would accept Mr. Mezei, the Attorney General's alternatives were reduced either to keeping Mr. Mezei detained indefinitely on Ellis Island or releasing him from detention and permitting him to return to his home and family. In the circumstances, however, the second alternative would have been a *de facto* admission contrary to Congress' intention to exclude security risks. In this light, it can be seen that Mr. Mezei's detention and his excludability were inextricably intertwined. Detention was the only means of enforcing the determination of excludability.

In contrast to the situation in *Mezei*, the detention of the petitioners here and the issues relating to their admissibility to the United States are separable. The petitioners are not being detained because they have been found excludable and no other country will accept them. Further, their parole pending adjudication of their asylum claims will not amount to a *de facto* admission to the United States. Last, and most important, it appears that

the petitioners are being detained because of their race and national origin. There is, therefore, no rational connection whatsoever between their detention and the issue of their admissibility to the United States. In the circumstances, lower-level immigration officials were not exercising the Attorney General's exclusion power when they incarcerated the petitioners and other Haitians in similar circumstances. Therefore, the officials are acting without any power because their mandate from Congress extends to exclusion and not to discrimination. Given that the detention of the petitioners is not related to the exclusion power, *Mezei* cannot provide authority for the proposition that the petitioners have no constitutional rights relative to their confinement.

In the circumstances, moreover, petitioners do have constitutional rights founded in the more relevant case of *Wong Wing v. United States,* 163 U.S. 228 (1896). In *Wong Wing,* the Court found that a type of detention of aliens (hard labor) was not rationally connected to the power to expel aliens and therefore could not be imposed without compliance with safeguards guaranteed by the concept of procedural due process. Although *Wong Wing* arose in the context of deportation proceedings, the case's posture does not distinguish it from the present case where the petitioners find themselves in exclusion proceedings. The reason is that, in each case, the detention is unconnected to the executive power to expel aliens—whether through exclusion or deportation proceedings. Thus, in each case, due process protects the detainees. Otherwise, totally unfettered power is sanctioned, no matter that it contradicts the principles upon which this country was founded. *See also United States v. Henry,* 604

F.2d 908 (5th Cir. 1979), (paroled alien accorded due process rights in context unrelated to exclusion).

Thus, it is simply not true that an alien seeking admission to this country has no constitutional rights whatever. It is obviously correct that when the government is exercising its exclusion powers, due process is whatever Congress has authorized. *Mezei* did no more than apply this rule to his detention because his detention was inseparable from his exclusion. Thus, on its facts, *Mezei* is plainly limited to circumstances where detention is inseparable from the issue of an alien's admissibility. That is not the case here. The detention of petitioners by lower-level immigration officials on the basis of invidious discrimination bears no rational connection to the power to exclude.

II.

Reexamination of the Holding in Mezei

Mezei has been accepted for the general proposition that a non-resident alien seeking admission to the United States has no constitutional rights whatever. However, as *Mezei* recognized, even such aliens have the right to bring an action in habeas corpus—an action based on the Constitution—to test whether procedures established by Congress to determine admissibility are in fact followed. Moreover, as discussed below, even that general proposition has been subjected to heavy criticism that followed almost immediately upon the decision. In line with these criticisms, we believe that *Mezei* should be reexamined with a view towards a due process analysis that allows the courts to take into account a balancing of the interests at stake. In such an analysis, even if a non-resident alien's rights are the most restricted, at least the courts

are allowed to balance those rights against egregious conduct as contrary to our country's principles as invidious racial discrimination.

Professor Henry Hart was an early critic of the *Mezei* decision. *See,* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1386-1396 (1953) [hereinafter "Hart"]. Professor Hart noted that prior to *Knauff* and *Mezei,* the Court had come to recognize that even if Congress' power over aliens were plenary, the existence of a jurisdiction in *habeas corpus,* coupled with the constitutional guarantee of due process, implied a regime of law.

> [The Court] saw that in such a regime the courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and—seemingly also—that human beings were not unreasonably subjected, even by the direction of Congress, to an uncontrolled official discretion.

Hart at 1390, citing the *Japanese Immigrant Case,* 189 U. S. 86 (1903).

Professor Hart notes that this "sound and humane philosophy" had been adhered to in deportation cases but ignored in the admission context largely through ignorance or oversight by later justices. Hart at 1391-1392. In Hart's view, the principle which had compelled repudiation of harsh early deportation decisions required repudiation of harsh exclusion precedents as well. Hart at 1394.

Professor Hart's analysis does not ignore differences between aliens seeking entry and those whom the government is attempting to deport. However, these differences are material only in determining the content of due process in the particular situation.

> What process is due always depends upon the circumstances, and the Due Process Clause is always flexible enough to take the circumstances into account.
>
> The distinctions the Court has been drawing recently [in Mezei and Knauff], however, are of a different order. They are distinctions between when the Constitution applies and when it does not apply at all. Any such distinction as that produces a conflict of basic principle, and is inadmissible.

Hart at 1392-1393.

In his treatise, Professor Kenneth Culp Davis calls the *Mezei* decision "one of the most shocking decisions the Court has ever rendered." 2 Davis, *Administrative Law Treatise,* (2d ed. 1979), S 11:5, p. 358 [hereinafter "Davis"]. He followed the case after the Supreme Court decision and learned that the Department of Justice became troubled at keeping *Mezei* at Ellis Island at government expense. The Department convened an ad hoc committee and allowed *Mezei* a chance to face and to rebut the evidence against him. Although the committee found that Mr. Mezei was a member of the Communist Party, it apparently found that he was not a national security risk and recommended that he be returned to his Buffalo home. In light of the revelation that "the Court had upheld denial of a hearing, even though no good reason existed for denying a hearing", Professor Davis is in agreement with Justice Jackson's dissent in *Mezei* that even "an alien seeking admission is a human being; therefore, he has rights." Davis at 358. He concludes that the time is ripe for an overruling of *Knaup* and *Mezei.* Davis at 360.

The territorial conception of the Constitution—that aliens seeking admission cannot invoke the Constitution because they are not "within" the United States—is at odds with the Court's decision in *Reid v. Covert,* 354 U.S. 1 (1957), where the Court extended constitutional protections to a citizen tried by court martial abroad. The plurality opinion in *Reid* concluded that wherever the government acts, it must do so "in accordance with all the limitations imposed by the Constitution." Id. at 6. Thus, it is not citizenship that triggers the applicability of constitutional protections, but the mere fact of government action. *Constitutional Limits on the Power to Exclude Aliens,* 82 Col. L. Rev. 957, 981-2 (1982).

CONCLUSION

The *Mezei* decision has been heavily criticized by legal commentators on the basis of principled, constitutional reasoning as well as rules of conscience and civility. The continued reliance on *Mezei* for the broad proposition that aliens seeking admission can assert no constitutional rights should be reexamined by the Court.

Respectfuly submitted,

Donald L. Ungar
Lawrence N. Dicostanzo
Terry J. Helbush
Bill Ong Hing
Kip E. Steinberg
Simmons & Ungar
517 Washington Street
San Francisco, CA 94111
(415) 421-0860

Counsel for Amicus Curiae

AMICUS CURIAE

BRIEF

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No. 84-5240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, *et al.*,

Petitioners,

v.

ALAN NELSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONERS

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
PENDA D. HAIR
99 Hudson Street
New York, New York 10013
(212) 219-1900

Attorneys for the NAACP Legal Defense and Educational Fund, Inc.

*Counsel of Record

Dated: January 17, 1985

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No. 84-5240

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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ALAN NELSON, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

==========

Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. In Support of Petitioners

==========

Statement of Interest of Amicus Curiae

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation which was established for the

purpose of assisting black citizens in securing their civil rights. It has been cited by the Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." NAACP v. Button, 371 U.S. 415, 422 (1963). The Legal Defense Fund has appeared before the Court on numerous occasions representing parties or as amicus curiae in cases involving the meaning and scope of constitutional and statutory guarantees of equality and non-discrimination.[1]

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[1] See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954); Swann v.Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); University of California Regents v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); Bob Jones University v. United States, ___ U.S. ___, 103 S.Ct. 2017 (1983).

This case presents the isssue whether official United States government policies of invidious racial and national origin discrimination are beyond the reach of the constitution because the immediate victims are excludable aliens. The case involves not only the interests of excludable aliens, but also the interests of citizens, who are harmed by the atmosphere of racial prejudice promoted by an official policy of discrimination. The Court's resolution of the issues presented by this case may materially affect the ability of amicus to advance its program of vindicating the civil rights of black citizens.

SUMMARY OF ARGUMENT

This case does not concern merely the rights of illegal, excludable aliens. The case is about the right of citizens to a government that sets an example for the

rest of society. The actions of defendants in this case set an example of racial prejudice and hatred. This example can be expected to permeate throughout society, reinforcing racist attitudes and undermining the national goal of eliminating racial and ethnic discrimination. Any official policy and program incorporating invidious racial lines, regardless of the identify of the immediate victims, represents an affront to the constitutional guarantee of equal protection.

ARGUMENT

I. The Constitution Prohibits Invidious Racial Discrimination Against Excludable Aliens

The court of appeals panel found that defendants' policy of detaining Haitian refugees is based on their national origin and the fact that their skin color is

black. 711 F.2d at 1484-85, 1487-1502. Other racial and ethnic groups are not subject to detention even though they are equally illegal and excludable from the United States. Id. The panel's findings are supported by the record[2] and were not challenged by the en banc court. Nonetheless, the en banc court reached the astounding conclusion that official government policies of racism are totally beyond the scope of the constitution so long as the direct victims of those policies are excludable aliens.[3]

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2 Documents in the record show that defendants intended to create detention camps to "be filled largely by blacks." PX 71a.

3 See 727 F.2d at 984. The absurd result of the en banc court's ruling is that Congress could enact and the Executive Branch could execute a law that required all black excludable aliens to be summarily killed.

Elimination of invidious discrimination on the basis of race and ethnic origin is a national goal of the highest order. The Court has recognized the "fundamental policy of eliminating racial discrimination" that is "rooted in our constitution" and supported by the Congress and the Executive Branch. Bob Jones University v. United States, ___ U.S. ___, 103 S.Ct. 2017, 2024, 2030 (1983). This policy, which originated in the struggle of black Americans for equality, has been "extended to all ethnic groups seeking protection from official discrimination." University of California Regents v. Bakke, 438 U.S. 265, 292 (opinion of Powell, J.). See Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (Celtic Irishmen)(dictum); Yick Wo v. Hopkins, 118 U.S. 356 (1886)(Chinese); Truax v. Raich, 239 U.S. 33, 41 (1915)

(Austrian resident aliens); Korematsu v. United States, 323 U.S. 214 (1944)(Japanese-Americans); Hernandez v. Texas, 347 U.S. 475 (1954)(Mexican-Americans).

The national policy to eradicate race and national origin discrimination extends beyond official discrimination. Congress and the Executive Branch have adopted an array of measures designed to prohibit or discourage private discrimination. Employment,[4] housing,[5] public accommodations[6] and programs receiving federal

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4 Title VII of the Civil Rights Act of 1954, 42 U.S.C. § 2000e et seq.

5 Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq.

6 Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq.

financial assistance[7] are a few examples of the types of private discrimination that our country is seeking to eliminate.

Of course, we are still a long way from the goal of eliminating racial and ethnic prejudice from our society. In order to free society from this evil, it is necessary that our government set the example. Thus, the constitutional guarantee of equal protection focuses its mandate on the actions of public officials, rather than on the identity of the immediate victims of those actions. The central purpose of the equal protection guarantee is "to do away with all governmentally-imposed discrimination based on race." Palmore v. Sidoti, ___ U.S. ___, 104 S.Ct. 1879, 1881-82 (1984)(emphasis added). "Racial and ethnic distinctions

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7 Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

of any sort are inherently suspect and thus call for the most exacting judicial examination." University of California Regents v. Bakke, 438 U.S. 265, 291 (1978)(opinion of Powell, J.)(emphasis added).

It has long been recognized that the harm from official acts of discrimination extends beyond the direct victims. Official policies and programs of race and national origin discrimination corrupt our governmental institutions, stigmatize all members of the disfavored group and incite further discrimination. As early as 1880 the Supreme Court took note of the devastating consequences of official of racism, concluding that exclusion of blacks from juries

> "is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to

> securing to individuals of the race that equal justice which the law aims to secure to all others."

Strauder v. West Virginia, 100 U.S. 303, 308.

The landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954), also is based on the principle that any official sanctioning of race-based lines promotes racism throughout society. The Court in Brown struck down segregated education for black and white school children even though the educational opportunities provided to each race were purportedly equal. The Court concluded that segregation gave an official imprimatur to the notion that race distinctions are relevant. "'[T]he policy of separating the races is usually interpreted as

denoting the inferiority of the negro group.'" 347 U.S. at 494 (1954) (quoting lower court).

This principle has been recently reaffirmed. In University of California Regents v. Bakke, the Court recognized that "any statute must be stricken that stigmatizes any group." 438 U.S. at 361 (opinion of Brennan, White, Marshall & Blackmun, JJ.)

The official policy of race and national origin discrimination at issue in this case victimizes all black citizens and particularly those citizens whose national origin is Haitian. The discriminatory policy of detaining Haitians was formulated by federal officials in the territorial United States, was carried out in federal buildings and on federal property and is supported by the tax dollars of United States citizens. The

fact that the United States government has chosen to jail Haitians because of their skin color and national origin represents an official statement that skin color and national origin are relevant to the purposes of detention. This official support for racial and ethnic discrimination reinforces racial and ethnic prejudices within our society. Public perception that skin color and national origin are relevant to whether an individual should be jailed inevitably leads to the perception that skin color and national origin are relevant for other public and private purposes. Thus the policy at issue undermines our constitutional and statutory commitment to the eradication of invidious discrimination.

The race and ethnic discrimination in this case distinguishes it from the situation in Shaughnessy v. Mezei, 345

U.S. 206 (1953). In that case the Court held that an excludable alien is not entitled to a hearing to determine whether he should be detained. There was no claim that the refusal to hold a hearing was based on the alien's race, skin color or national origin. Rather, the government asserted that the alien posed a national security risk.

In Mezei, whether to grant a hearing affected only the interests of the excludable alien, who was held not to be entitled to the due process protections afforded citizens. In the instant case, the denial of parole on the basis of race and ethnic origin infringes on the constitutional rights of United States citizens by creating the public perception that racial and ethnic prejudice is acceptable.

CONCLUSION

For the reasons stated, the decision of the United States Court of Appeals for the Eleventh Circuit, sitting en banc, should be reversed.

Respectfully submitted,

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
PENDA D. HAIR
99 Hudson Street
New York, New York 10013
(212) 219-1900

Attorneys for the
NAACP Legal Defense and
Educational Fund, Inc.

*Counsel of Record

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AMICUS CURIAE

BRIEF

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ALAN C. NELSON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

January 17, 1985

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law.

The American Civil Liberties Union has long worked to defend the rights of aliens in their interactions with the immigration authorities. In so doing, the American Civil Liberties Union has filed briefs, as counsel for a party or as amicus curiae, in many cases that required construction of federal immigration statutes or interpretation of federal constitutional provisions in the immigration context.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amicus curiae.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The principal issue raised by this petition is whether officials of the United States may treat excludable Haitian aliens attempting to seek asylum in this country more harshly than other excludable aliens because of their race and national origin.

The panel below correctly ruled that the Fifth Amendment barred race and national origin discrimination against all persons, including excludable aliens, and that the District Court's failure to find invidious discrimination against the Haitian petitioners was "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983). But the en banc majority below reversed, deeming the issue of invidious discrimination irrelevant because, under the en banc majority's reading of the Fifth Amendment, excludable aliens

must be viewed as constructively absent from the United States for immigration purposes and, thus, possess no rights at all under the Fifth Amendment to be free from racial discrimination in the administration of the immigration laws. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc).

By permitting the very existence of Fifth Amendment protection against invidious discrimination to turn on the legal fiction of "constructive absence", the en banc majority erroneously replicated the discredited mode of analysis utilized in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Since Ex parte Milligan, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866), the existence of constitutional protection has turned, not on legal fictions, but on an assessment of physical and biological reality. As human beings physically within the United States, excludable aliens are persons within the

meaning of the Fifth Amendment, without regard to the legal fiction of "constructive absence."

Once it is established that excludable aliens, as human beings physically within the United States, are protected by the Fifth Amendment, it follows that they may not be adversely treated by government officials because of their race and national origin. While the precise scope of constitutional protection available to excludable aliens has been limited, especially when admission under the immigration laws is at issue, at a minimum the Fifth Amendment flatly forbids the government from enforcing the immigration laws more harshly against one group of excludable aliens on the basis of race and national origin. E.g., Palmore v. Sidoti, 80 L.Ed.2d 421 (1984); Korematsu v. United States, 323 U.S. 214 (1944).

Accordingly, the refusal of the en banc

majority to confront the panel's finding of invidious discrimination was erroneous because it flowed from an insupportably narrow reading of the Fifth Amendment. Amicus suggests that the decision of the en banc majority should, therefore, be vacated and the case remanded with instructions that petitioners are persons within the meaning of the Fifth Amendment and, as such, may not be the target of invidious discrimination in the administration of the nation's immigration laws.

ARGUMENT

I. Excludable Aliens, as Human Beings Physically Present Within the United States, are "Persons" Within The Meaning of the Fifth Amendment And may not be Treated as "Constructively Absent" for the Purposes of Determining Whether Race and National Origin Discrimination Has Taken Place in The Administration of the Nation's Immigration Laws.

This case does not raise broad questions

concerning the substantive scope of constitutional protection available to excludable aliens. It seeks to establish neither a right to enter the United States; nor a right to freedom pending ultimate resolution of immigration status; nor, even, rights concerning the conditions under which Haitian refugees may be confined. Rather, it raises the narrower question of whether excludable aliens physically within the United States are "persons" within the meaning of the Fifth Amendment and, thus, are entitled to be free from race and national origin discrimination in the enforcement of the nation's immigration laws.

The en banc majority below conceded, as it must, that this Court has repeatedly recognized that undocumented aliens are entitled to basic constitutional protection against official wrongdoing. In Plyler v. Doe, 457 U.S. 202, 210 (1982), for example,

this Court explicitly ruled that the children of unlawful aliens are protected by the Fourteenth Amendment against invidious discrimination by state and local officials. See also Matthews v. Diaz, 426 U.S. 67 (1975); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Similarly, in Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931), this Court held that excludable aliens outside the United States are protected by the Fifth Amendment against unlawful seizures of their property by the United States. See also United States v. Pink, 315 U.S. 203, 228 (1942).

While recognizing that excludable aliens are constitutional "persons" for certain purposes, the en banc majority insisted that, for the purposes of administering the nation's immigration laws, excludable aliens should be treated as "constructively absent"

or as if they were "at the border" and, thus, wholly outside the coverage of the anti-discrimination guarantee of the Fifth Amendment. Whatever the substantive scope of constitutional protection actually available to excludable aliens, however, surely the question of whether they are within the protection of the Fifth Amendment at all cannot rest on a legal fiction that insists upon treating excludable aliens as though they are not physically present. While legal fictions do play a significant role in the law, they cannot be permitted to substitute for analysis and to mock reality. See generally, L. Fuller, Legal Fictions 10, 70-71 (1967). Unfortunately, the en banc majority permitted the legal fiction of an excludable alien's "constructive absence" from the United States to acquire a false life of its own.

The "entry doctrine" fiction in the

context of an application for admission holds that an excludable alien is not in the United States. The "entry doctrine" fiction, when properly limited to admission decisions, prevents an alien who is physically present, but has been denied legal entry, from receiving the advantages that our immigration laws bestow upon resident aliens. See, e.g., Landon v. Plasencia, 459 U.S. 21 (1982); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). The fiction also enables government officials to keep an alien in the legal category of "excludable aliens" without having physically to eject the alien from our shores pending an admission decision.

Because the "entry doctrine" fiction requires courts to assume as true a set of "facts" that are patently false -- that excludable aliens physically present in the United States are not present for purposes of

the admission decision -- the fiction must seek its justification in considerations of public policy.[1] The policy concerns that justify application of the legal fiction of "constructive absence" in the admission context simply do not extend to the parole context. The en banc opinion below did not explain its extension of the "entry doctrine" fiction from admission decisions to parole decisions, other than by relying on an uncritical citation to the severely criticized[2] and distinguishable decision in

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[1] See L. Fuller, Legal Fictions 71 (1967) (quoted in Samek, Fictions and the Law, 31 U. Toronto L.J. 290, 340 (1981)).

[2] See Shaughnessy v. United States ex rel. Mezei, 345 U.S. at 216-18 (Black, J., dissenting, joined by Douglas, J.); id. at 218-28 (Jackson, J., dissenting, joined by Frankfurter, J.): Trop v. Dulles, 356 U.S. 86, 102 n. 36 (1958); 2 K. Davis, Administrative Law Treatise § 11:5, at 358 (2d ed. 1979) ("The holding that a human being may be incarcerated for life without opportunity to be heard on charges he denies is widely considered to be one of the most shocking decisions the Court has ever rendered."); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1392, 1395 (1953); Developments, Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev.
[cont'd. on next pg]

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). Contrary to the bald assertions in the en banc opinion, admission and parole are not the same for the purposes of constitutional or statutory analysis. In 8 U.S.C. § 1182(d)(5)(A), Congress has drawn a clear line separating admission from parole: the latter does not constitute admission, and an excludable aliens's status -- whether in detention or on parole -- does not affect the entirely independent admission decision. The recognition that an alien is present for the purposes of a parole decision does not force the government to apply criteria and procedures more favorable to the alien than if the alien were deemed "not present" through the use of a legal fiction.

1286, 1322-24 (1983); Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165, 173-80 (1983); Note, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957, 979-80 (1982).

Thus, extension of the "entry doctrine" fiction to cover parole decisions serves no useful purpose and has the sole effect of permitting race and national origin discrimination against disfavored categories of excludable aliens. In contrast to the "entry doctrine" fiction in the admission context, no legitimate public policy, such as securing our borders against illegal entry or providing immigration officials with a convenient and humane method to process applications for admission, justifies selective, long-term detention based solely on the color of a person's skin and his country of origin.

The "entry doctrine" fiction in the parole context suffers from a final, irremediable flaw. To pretend that these human beings are not in the United States at the same time that the United States Government keeps them incarcerated reveals

that this fiction has exceeded its bounds. The conundrum that a person in long-term federal custody is not present befits George Orwell's Oceania, not the courts of the United States. As Justice Jackson wrote in dissent in Mezei, "It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound." Shaughnessy v. United States ex rel. Mezei, 345 U.S. at 220 (Jackson, J., dissenting); see Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1056 n. 6 (N.D. Ga. 1981) ("The legal fiction that an excludable alien is 'waiting at the border' wears quite thin after a year at the Atlanta Federal Penitentiary.").

Unfortunately, therefore, the legal fiction of "constructive absence," which has often acted as a shorthand for the common-sense notion that an excludable alien ought not reap an immigration law benefit from the act of illegal entry, became transmuted by

the en banc majority below into a rigid dogma that denied excludable aliens not merely an immigration law benefit, but fundamental constitutional protection against invidious discrimination in the administration of the nation's immigration laws. Where, as here, an excludable alien seeks merely to escape discriminatorily harsh treatment because of his race and country of origin, the alien does not seek to reap an immigration law advantage. On its own terms, therefore, the legal fiction of "constructive absence" is inapplicable to a claim of race and national origin discrimination.

More fundamentally, however, legal fictions are too thin a reed on which to found wholesale exemptions from constitutional protection. It is the lesson of Dred Scott v. Sandford, as taught by Ex parte Milligan, that the applicability of constitutional guarantees turns not on the

assertion of a legal fiction, but on an honest assessment of physical and biological reality.

In Dred Scott v. Sandford, supra, a slave sought to establish his freedom by suing an owner who had taken him into states and territories where slavery was forbidden. Since subject matter jurisdiction was premised on diversity, Dred Scott's citizenship was crucial. Chief Justice Taney, writing for the Court, declined to adopt a physical or biological definition of citizenship as the term is used in Article III. Rather, he insisted upon a "legal" definition of the term which wholly excluded freed slaves from United States citizenship even when they were deemed citizens of their respective states. Dred Scott, with its thinly disguised veneer of racism, is mute testimony to the dangers of allowing legal conclusions about the meaning of phrases like

"person" or "citizen" to trump physical and biological reality in determining the applicability of basic constitutional guarantees.

The post-Civil War Supreme Court wasted little time in repudiating Dred Scott's use of legal conclusions to measure the applicability of constitutional guarantees. In Ex parte Milligan, an Indiana resident sentenced to death by a military tribunal for his pro-Southern activities challenged the jurisdiction of the military courts. In carefully chosen language designed to repudiate Dred Scott, the Court held:

> The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of

government.

18 L. Ed. at 295 (emphasis added).

A constitution which protects "all classes of men, at all times, and under all circumstances" cannot be held hostage to a legal fiction. Thus, although the Fifth Amendment rights of excludable aliens may be narrow, especially in the immigration context, they cannot be wholly destroyed by the simple expedient of pretending that excludable aliens are not really here.

II. The Fifth Amendment Forbids Immigration Officials From Treating Certain Excludable Aliens More Harshly Than Others on the Basis of Race and National Origin.

There is, of course, a significant gap between recognizing that excludable aliens are "persons" within the meaning of the Fifth Amendment and defining the actual scope of their Fifth Amendment rights.

As a matter of constitutional

construction, the Court has been extremely cautious in defining the quantum of constitutional protection available to excludable aliens, especially when such rights would have an impact on decisions affecting admissibility. Thus, in Kwong Hai Chew v. Colding, 344 U.S. 590 (1953), and Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Court narrowly defined the quantum of procedural protections which the Fifth Amendment guarantees to excludable aliens. See also United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Similarly, in Fiallo v. Bell, 430 U.S. 787 (1977), and Landon v. Plasencia, 459 U.S. 21 (1982), the Court narrowly defined the nature of equal protection and due process guarantees in an immigration context. Whatever the quantum of constitutional protection generally available to aliens, at a minimum, however, their

official treatment may not vary because of the color of their skin or their country of origin. See Graham v. Richardson, 403 U.S. 365 (1971). Race and national origin discrimination in the administration of justice is flatly prohibited by the Fifth Amendment because it "strikes at the fundamental values of our judicial system and our society as a whole." Rose v. Mitchell, 443 U.S. 545, 556 (1979). Indeed, much of the struggle for constitutional rights during the past century has centered on the repeated efforts by this Court to eliminate racism and nativism as a factor in American law. In Palmore v. Sidoti, 80 L.Ed.2d 421 (1984), for example, the Court invalidated a Florida decree altering child custody because the custodial parent had entered into an interracial marriage. Palmore is simply the latest attempt by the Court to banish racism from the administration of our law. Racial

discrimination in jury selection was invalidated in Strauder v. West Virginia, 100 U.S. 303 (1880), and Ex parte Virginia, 100 U.S. 339 (1880). Discrimination in grand jury selection on the basis of national origin was struck down in Hernandez v. Texas, 347 U.S. 475 (1954), and Castaneda v. Partida, 430 U.S. 482 (1977). National origin discrimination in the administration of local law was invalidated in Yick Wo v. Hopkins, 118 U.S. 356 (1886). Racial discrimination in voting was condemned in Ex parte Siebold, 100 U.S. 371 (1880), Ex parte Yarbrough, 110 U.S. 651 (1884), Guinn v. United States, 238 U.S. 347 (1915), Nixon v. Herndon, 273 U.S. 536 (1927), Lane v. Wilson, 307 U.S. 268 (1939), White v. Regester, 412 U.S. 755 (1973), and Rogers v. Lodge, 458 U.S. 613 (1982). Racial gerrymandering was invalidated in Gomillion v. Lightfoot, 364 U.S. 339 (1960). Racially restrictive real

estate covenants were held unenforceable in Shelley v. Kraemer, 334 U.S. 1 (1948), and Barrows v. Jackson, 346 U.S. 249 (1953). The first Justice Harlan's vision was fulfilled when racially segregated public schools were invalidated in Brown v. Board of Education, 347 U.S. 483 (1954), and Cooper v. Aaron, 358 U.S. 1 (1958). In Griffin v. Prince Edward County School Board, 377 U.S. 218 (1964), this Court reopened a public school system that had closed in response to a desegregation order.

Racially segregated parks and recreational facilities were invalidated in Watson v. Memphis, 373 U.S. 526 (1963). Racially segregated courtroom seating was struck down in Johnson v. Virginia, 373 U.S. 61 (1963). Racial identification of candidates for public office was invalidated in Anderson v. Martin, 373 U.S. 399 (1964). Bans on inter-racial cohabitation and

marriage were invalidated in, respectively, McLaughlin v. Florida, 379 U.S. 184 (1964), and Loving v. Virginia, 388 U.S. 1 (1967). Racial discrimination in prisons was struck down in Lee v. Washington, 390 U.S. 333 (1968). National origin discrimination in a property ownership statute was condemned in Oyama v. California, 332 U.S. 633 (1948). Racially motivated attempts to block open housing legislation were invalidated in Reitman v. Mulkey, 387 U.S. 369 (1967), and Hunter v. Erickson, 393 U.S. 385 (1969). Racially motivated attempted to enforce state trespass laws were invalidated in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

In fact, since the Civil War, the only case upholding official racial discrimination against persons physically in the United States is Korematsu v. United States, 323 U.S. 214 (1944), which upheld the relocation of Japanese-Americans to internment camps

during the Second World War as furthering, under the difficult circumstances facing the nation at that time, a compelling governmental interest. Whatever the current validity of Korematsu as a precedent, however, the United States has not even attempted to demonstrate the "pressing public necessity" that even Korematsu demands before the government can adversely affect someone because of race or national origin.

Given the enduring nature of this Court's refusal to tolerate race and national origin discrimination by government officials, it is extremely unlikely that, on the merits, this Court would uphold the power of low-level officials to treat the Haitians differently from other groups on the basis of race. Yet, the net effect of the en banc majority's decision is to remove such racial discrimination from the coverage of the Fifth Amendment. By pretending that excludable

aliens are "constructively absent," the en banc majority reached a de facto decision on the merits which is utterly antithetical to a century of this Court's jurisprudence.

The impossibility of squaring the result reached by the en banc majority with the precedents of this Court invalidating official racial and national origin discrimination illustrates the dangers of permitting legal fictions to dominate constitutional analysis. Legal fictions risk constitutional results that could never be justified through open analysis. When, however, excludable aliens are viewed in the light of reality, and not veiled behind a legal fiction, the result below, which permits the color of an alien's skin and his country of origin to determine the nature of his treatment by immigration officials, cannot be sustained.

III. The Court Need Not Review the Panel's Determination That The Record Clearly Established Race and National Origin Discrimination in the Treatment of Haitian Refugees.

If the Court agrees with our submission that the petitioners' confinement must be measured against the Fifth Amendment, then, based on the panel's plainly correct finding that the requisite unlawful discrimination was made out, the judgment below should be vacated and the case remanded for the formulation of a remedy for Fifth Amendment violation.

The panel decision below ruled that the District Court's failure to find racial discrimination in the treatment of the Haitian petitioners was clearly erroneous under Rule 52(a) Fed. R. Civ. P. The en banc majority, misled by its incorrect reading of the Fifth Amendment, did not question the panel's factual finding that race and national origin discrimination had been

established, but under its erroneous reading of the law, in effect deemed such invidious discrimination constitutionally irrelevant.

At trial, petitioners proved an overwhelming case of discrimination at the hands of low-level immigration officials who singled out Haitians for uniquely harsh treatment, especially in the context of parole. Where, as here, the aliens subject to discriminatorily harsh treatment are members of both a particular nationality and a racial minority, this Court has insisted upon the most rigorous judicial scrutiny. E.g., Korematsu v. United States, 323 U.S. 214 (1944) (Japanese nationality or ancestry); Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican-Americans); Oyama v. California, 332 U.S. 633, 644-47 (1948) (Japanese); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Chinese). See also Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

The district court held that the evidence did not support an inference of intentional discrimination, but the panel reversed, based on its thorough review of the record. See Jean v. Nelson, 711 F.2d at 1486-1502. The panel was fully cognizant of this Court's command that when an appellate court reviews a district court's findings of fact in an intentional discrimination case, Fed. R. Civ. P. Rule 52(a) means what it says: that the district court's findings may be set aside only if "clearly erroneous." See 711 F.2d at 1496 (citing Pullman Standard v. Swint, 456 U.S. 273 (1982)). The panel, relying on a detailed review of the evidence, clearly and thoroughly conveyed its "definite and firm conviction that a mistake ha[d] been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).[3] The

[3] The Eleventh Circuit panel also identified several respects in which the district court misunderstood or misapplied the law for proving or rebutting a prima [cont'd. on next pg]

panel did not merely state that it would have given greater weight to some of plaintiffs' evidence or would have granted less credibility to some of defendants' witnesses. This case is thus easily distinguished from Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855-59 (1982), in which this Court reversed the court of appeals' rejection of a district court's findings of fact based on the appellate court's view of the weight and sufficiency of the evidence. This Court said that since the court of appeals had not deemed the district court's factual findings clearly erroneous, the court of appeals should have left those findings

facie case of purposeful discrimination. 711 F.2d at 1487. To the extent that the district court's ultimate finding was based on errors of law, the reviewing court is not bound by the "clearly erroneous" standard of Rule 52(a). See Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 n. 15 (1982); United States v. Singer Manufacturing Co., 374 U.S. 174, 194 n. 9 (1963).

undisturbed. In the instant case, the panel left no doubt concerning its view that the district court had clearly erred.

As in Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979), the panel utilized the proper criteria and standards in exercising appellate review over the fact-finding process. While it would, of course, be within this Court's power to conduct a de novo review of the record to determine whether the panel's reading of the record accords with a reading by this Court, amicus suggests that, in the absence of an argument that the panel utilized improper criteria or standards in applying Rule 52(a), concern for principles of sound judicial administration calls for an affirmance of the panel's fact-based conclusions. While amicus is confident that an independent reading of the factual record by this Court would merely reinforce the panel's finding that a failure to find

invidious discrimination against Haitians was clearly erroneous, it is a questionable use of the Court's limited resources to replicate a fact-bound inquiry by a lower federal court that has utilized the proper criteria and standards.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit en banc, which held that excludable aliens have no Fifth Amendment rights, should be vacated.

Respectfully submitted,

BURT NEUBORNE,
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800*

January 17, 1985

* Counsel gratefully acknowledge the assistance of Carl H. Loewenson, Jr., a law school graduate whose application for admission to the New York State Bar is pending.

AMICUS CURIAE

BRIEF

No. 84-5240

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, *et al.*,

Petitioners,

vs.

ALAN C. NELSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICI CURIAE BRIEF OF THE NATIONAL COALITION FOR HAITIAN REFUGEES AND 39 MEMBER ORGANIZATIONS

THE MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS TASK FORCE ON HAITIAN REFUGEES

THE COMMITTEE ON MIGRATION AND REFUGEE AFFAIRS OF INTERACTION AND 22 MEMBER ORGANIZATIONS

ET AL.

MICHAEL S. HOOPER
MUZAFFAR A. CHISHTI
WADE J. HENDERSON
National Coalition for
Haitian Refugees
275 Seventh Avenue
New York, New York 10001
(212) 741-6152

Counsel for Amicus Curiae

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ON WRIT OF CERTIORARI TO
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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the National Coalition for Haitian Refugees a 39 member organization,[1] The Committee

[1] The national member organizations are: the AFL-CIO, the A. Phillip Randolph Institute, the American Civil Liberties Union, the American Council for Nationalities Service, the American Friends Service Committee, the American Immigration Lawyers Association, the American Jewish Committee, America's Watch, the Catholic League for Religious and Civil Rights, the Center for Immigrants Rights, Inc., the Center for Migration Studies, the Center for the Social Sciences, Columbia University, Church World Service of the National Council of Churches, Comite Interregional Pour Refugies Haitien, Inc., Committee for Defense of Haitian Refugees, the Haitian Refugee Center, Inc., Immigration Law Project of the National Lawyers Guild, the International Ladies' Garment Workers' Union, the International Rescue Committee, the Lawyers Committee for International Human Rights, the Leadership Conference on Civil Rights, League of United Latin American Citizens, L.I.N.K.S. International, Inc., Lutheran Immigration and Refugee Service, the N.A.A.C.P., the National Conference of Catholic Bishops, the National Conference of Catholic Charities, the National Council of Negro Women, the National Emergency Civil Liberties Union, the National Urban League, Inc., the Refugee Policy Group, the Southern Christian Leadership Conference, the Synagogue Council of America, the Unitarian Universalist Service Committee, the United Presbyterian Church in the U.S.A., the United States Catholic Conference, and the Young Men's Christian Association of the United States.

on Migration and Refugees of INTERACTION a 22 member organization,[2] the Members of the Congressional Black Caucus Task Force on Haitian Refugees (including the Honorable Walter Fauntroy – Chair, the Honorable George W. Crockett, Jr., the Honorable Julian Dixon, the Honorable Major R. Owens and the Honorable Edolphus Towns), the United Automobile, Aerospace, and Agricultural Implement Workers of America – UAW International Union, the National Conference of Black Lawyers, and the National Conference of La Raza.

Amici are interested in this case because of their shared concern for the plight of the Haitian refugee boat people, their belief that due process and equal treatment under the laws should be afforded to citizens and non-citizens, and their dedication to the elimination of all vestiges of invidious discrimination on the basis of national origin or race from public policy and public life.[3]

[2] The member organizations of the Committee on Migration and Refugee Affairs of INTERACTION are: the Catholic Relief Services/United States Catholic Conference, Church World Service Immigration and Refugee Program, the Tolstoy Foundation, the World Relief Corporation, the American Friends Service Committee, the Presiding Bishop's Fund for World Relief (The Episcopal Church), the World Vision Relief Organization, the Young Women's Christian Association of the U.S.A. (World Relations Unit of the National Board), the International Rescue Committee, the Young Men's Christian Association of the United States, the American ORT Federation, the American Council for Nationalities Service, the Polish American Immigration and Relief Committee, the Migration and Refugee Services/United States Catholic Conference, the Adventist Development and Relief Agency International, the American Fund for Czechoslovak Refugees, the Buddhist Council for Refugee Rescue and Resettlement, the American Jewish Joint Distribution Committee, the Lutheran Immigration and Refugee Service, the Hebrew Immigrant Aid Society (H.I.A.S.), the Save the Children Federation, and the Experiment in International Living.

[3] *Amici* have filed with the Clerk of the Court letters from the parties consenting to the filing of this brief.

STATEMENT OF THE CASE

This case challenges the unprecedented holding of the Court of Appeals for the Eleventh Circuit in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), that invidious race and national origin discrimination by low-level officials in the incarceration of black Haitian refugees is completely beyond the scope of the Constitution and its fundamental protections.

Petitioners are Haitian refugees who risked their lives crossing 800 miles of hazardous ocean in flimsy sailboats to seek safety and political asylum on our shores because they feared persecution and even death in Haiti. The panel below found unrebutted evidence of a stark pattern of intentional discrimination against the Haitians on the basis of their race and national origin. *Jean v. Nelson*, 711 F.2d 1455, 1501 (11th Cir. 1983). They were the victims of a program of incarceration in isolated federal prisons and detention facilities. In clear contrast to procedures for aliens and asylum seekers of other nationalities and races, the Haitians were shipped to remote prisons, denying petitioners the benefits of legal support and Creole interpreters, as part of what the district court described as a "human shell game." *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981).

The *en banc* court did not disturb the detailed factual conclusions of the panel opinion, *Jean v. Nelson*, 727 F.2d at 962, but rather, proceeded to decide whether the Haitian petitioners were protected by the equal protection guarantee of the fifth amendment. Its conclusion that invidious discrimination against Haitian excludable aliens was wholly beyond constitutional scrutiny is unprecedented in our constitutional history, exumes the discredited rationale of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and perpetuates the legal fiction of "constructive absence" to assert that some *human beings* physically present in the United States *are not persons* for purposes of the fifth amendment.

SUMMARY OF ARGUMENT

This case involves one basic issue: whether low-level officials of the United States may treat excludable Haitian aliens more

harshly because of national origin or race than they treat other excludable aliens in making decisions that do not directly relate to their admission into the United States. This case does not raise broad questions concerning the substantive scope of constitutional protections available to excludable aliens. Rather, it raises the narrower question of whether excludable aliens are "persons" within the meaning of the fifth amendment, and thus, are entitled to be free from racial and national origin discrimination in the administration of the nation's immmigration laws. *Amici* argue that:

1. Petitioners, as "persons" in the United States, are entitled to the equal protection guarantee of the due process clause of the fifth amendment. At a minimum, this guarantee provides protection against invidious discrimination by the government on the basis of race. The basic constitutional protections which must be afforded petitioners are not diminished by the argument that their classification is based on national origin instead of race, since national origin discrimination is as despicable as racial discrimination.

2. Congress has repeatedly evinced its intent to remove all vestiges of discrimination on the basis of race and national origin from our immigration laws. The intent and impact of the respondents' policy toward the petitioners challenged in this case is at odds with that established congressional intent.

ARGUMENT

I.

BLACK HAITIAN REFUGEES, AS HUMAN BEINGS PHYSICALLY PRESENT WITHIN THE UNITED STATES, ARE "PERSONS" PROTECTED BY THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT"

In *Jean v. Nelson* the Eleventh Circuit held that race and national origin discrimination by Immigration and Naturalization Service ("INS") enforcement officials was completely beyond constitutional scrutiny. *Amici* submit that this result is incorrect for at least two reasons. First, the protections of the fifth amendment apply to all persons regardless of their legal status. Second, the Constitution applies whenever and wherever the government acts. While the scope of constitutional protections may vary with the context, the Constitution is never absent where the government and persons are present. At a minimum, on the facts of this case, the Constitution prohibits invidious race and nationality discrimination against petitioners.

A. Persons should not be treated as "constructively absent" for constitutional purposes

The decision of the *en banc* majority is based primarily on the unwarranted legal fiction that for all immigration purposes the Haitian aliens are "constructively absent" from the United States, and are thus not persons entitled to even minimal constitutional protections. This conclusion contradicts the well-established principle that constitutional protections apply to all living human beings in the United States regardless of legal status. "Even [an alien] whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). "Whatever his status under the immigration laws, an alien is surely a 'person' [protected by the due process clauses of the fifth and fourteenth amendments]." *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

The Haitians are indisputably persons "in any ordinary sense of that term." *Plyler v. Doe*, 457 U.S. at 210. It was only through the use of a legal fiction that the *en banc* court was able to conclude that Haitian petitioners, although persons, could not invoke the protections of the fifth amendment. Whenever such legalistic sleight of hand denies an obvious truth, our political and legal systems are morally devalued.

The *Dred Scott* decision is infamous testimony to the numerous dangers of treating any group of human beings as "non-persons." In commenting on *Dred Scott*, Abraham Lincoln criticized the implications of its reasoning:

> Those who deny freedom to others, deserve it not to themselves.... I believe the declaration that "all men are created equal" is the great fundamental principle upon which our free institutions rest....
>
> ... If we once abandon the principles of our fathers, that all men are born free and equal, and if we declare that Negroes are not the equals of whites, the next step will be to declare that not all the whites are equal....

Ludwig, *Lincoln* 203 (1930). So too in the present case, our society's principles and institutions are eroded when people subjected to our laws are denied the protection of those laws.

B. Constitutional limitations apply to all government action

The second fundamental flaw in the *en banc* court's reasoning was its implicit assumption that some governmental action may be beyond constitutional scrutiny. On the contrary, it is absolutely central to our system of government that every official action be in "accordance with all the limitations imposed by the Constitution." *Reid v. Covert*, 354 U.S. 1, 6 (1957). "The Constitution of the United States is in force...wherever and whenever the sovereign power of that government is exerted."

Balzac v. Porto Rico, 258 U.S. 298, 312 (1922). "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 70 U.S. (4 Wall.) 281, 295 (1866). Accordingly, when the government acts, the Constitution cannot be ignored.

To say that all persons are entitled to due process, and that all governmental action is limited by the Constitution, does not end the inquiry. The precise scope of the constitutional protections and limitations varies with the context.* At a minimum, however, the Constitution prohibits invidious discrimination on the part of low-level enforcement officials acting pursuant to facially neutral statutes and directives.

C. As "persons" in the United States subject to government actions excludable aliens are protected by the fifth amendment guarantee against discrimination

The fifth amendment provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const., amend. V. This Court has long recognized that the due process clause imposes limits on the discriminatory actions of the federal government, analagous to those imposed on states by the equal protection clause of the fourteenth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Accordingly, adverse discrimination by the federal government based upon race or national origin is "constitutionally suspect," *id.* at 499, and is subject to the most rigid scrutiny. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

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* Although the political branches may possess plenary power regarding admission and expulsion of aliens, this case does not challenge such power. This case raises only the narrow question of whether petitioners are entitled to be free from invidious discrimination in the administration of the nation's immigration laws in questions unrelated to admission decisions.

At trial, petitioners "mustered an impressive array of witnesses and an equally impressive number of documents to demonstrate circumstantially, and to an extent directly, intentional government discrimination against Haitians." *Jean v. Nelson*, 711 F.2d at 1474. Although it is undisputed that petitioners' class consists exclusively of *black* individuals, respondents seek to avoid the legal consequences of their invidious discrimination by asserting that the panel did not find *racial* discrimination, but merely national origin discrimination. Brief for Respondents in Opposition [to Granting a Writ of Certiorari] at 17.

Even if respondents' characterization of this case were accurate,[5] respondents could draw little legal comfort from the fact that they were guilty of "only" national origin discrimination. Discrimination based upon national origin is as offensive to the Constitution as is racial discrimination, and is subject to the same searching scrutiny[6].

As this Court has long recognized, the protections of the Constitution "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Furthermore, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81,

[5] Respondents' assertion that the panel found only national origin discrimination is manifestly false. The panel did *not* limit its finding of discrimination against petitioners to nationality based discrimination. It simply noted that "[t]he *bulk* of the evidence ... was addressed to the nationality claim." *Jean v. Nelson*, 711 F.2d at 1485 n. 9.

[6] Further, nationality based discrimination is no less despicable and unconstitutional where, as here, the affected class is overwhelmingly black. *See Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 451 (S.D. Fla. 1980), *aff'd as modified sub nom. Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

100 (1943) (Japanese). Accordingly, a selection system which excludes individuals from jury service "*solely because of their ancestry or national origin* is discrimination prohibited by the Fourteenth Amendment." *Hernandez v. Texas*, 347 U.S. 476, 479 (1954) (Mexican-Americans) (emphasis supplied); *see also Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). ("Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment").

Because ethnic and national groups are distinct and insular minorities, "heightened judicial solicitude is[7] appropriate." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). In *Hernandez v. Texas*, 347 U.S. 475 (1954), this Court held that the constitutional protections of the fourteenth amendment are not directed "solely against discrimination due to a 'two-class theory' – that is, based upon differences between 'white' and 'Negro.' " 347 U.S. at 478. In recognizing that national groups are entitled to the same constitutional protections as racial groups, the Court observed that "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same [constitutional] protection." *Id.*

This case involves more than the "abstract question" whether the Haitians' suspect classification is based on race or on national origin. *Plyler v. Doe*, 457 U.S. at 223. To single out a specific group for adverse government action is to invite stigma. Such classifications encourage prejudice and stereotypes that the equal protection doctrine was designed to eradicate.

In the present case, petitioners presented a clear case of discrimination against them by the INS officials. Whether such discrimination was primarily motivated by considerations of

[7] Since race and national origin discrimination are equally offensive, they must meet be subjected to the same "rigid scrutiny." *Korematsu v. United States*, 323 U.S. at 216 (Americans of Japanese descent). "Classifications ... based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage case).

race or national origin is immaterial. Invidious discrimination is no less unconstitutional when based upon nationality than when based upon race.

II.

CONGRESS HAS CLEARLY EVINCED ITS INTENT TO REMOVE RACIAL AND NATIONAL ORIGIN DISCRIMINATION FROM OUR IMMIGRATION LAWS

Although this nation's early immigration laws were blatantly discriminatory, over the last thirty years Congress has acted steadily and consistently to remove all racial and national origin discrimination from American immigration policies. Commencing with the enactment of the Immigration and Nationality Act in 1952, which eliminated race as a bar to immigration and naturalization, and continuing through the Refugee Act of 1980, which codified this nation's commitment to a non-discriminatory asylum and refugee law, Congress has repeatedly affirmed that racial and national origin discrimination has no place in our immigration laws. In view of clear and persistent congressional condemnation of such discrimination, the *en banc* court plainly erred when it concluded that Congress has delegated authority to the Attorney General "to discriminate on the basis of national origin in making parole decisions." *Jean v. Nelson*, 727 F.2d at 963. It is simply inconceivable that Congress, which was striving "to eliminate the last vestiges of racial discrimination from our immigration laws," 111 Cong. Rec. S24446 (Sept. 20, 1965) (remarks of Sen. Fong), could have intended to permit the executive to accomplish through administrative action a result inconsistent with its own efforts.

A. Early immigration laws contained overtly discriminatory provisions

For approximately the first century of this nation's history, there were few significant restraints on immigration.[8] In the

[8]With the exception of a short-lived regulation enacted in 1798 (*see* 1 Stat. 570), the Congress did not legislate to restrict immigration until 1875, when it passed a statute excluding specific classes of immigrants such as convicts, prostitutes, and mental and physical incompetents. 18 Stat. 477 (1875).

latter portion of the nineteenth century, however, pressure began to mount for restrictions on free immigration. Congress passed the Chinese Exclusion Act in 1882, which suspended the immigration of Chinese laborers for ten years, and prohibited the granting of American citizenship to Chinese immigrants. 22 Stat. 58 (1882). In 1884 the Act was amended to cover all ethnic Chinese wherever they resided. 23 Stat. 115 (1884). The Act was extended in 1892 (27 Stat. 25) and 1902 (32 Stat. 176); in 1904 the Act was extended indefinitely. 33 Stat. 428 (1904).[9]

"During World War I opposition to free immigration gained momentum." H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1665. In 1917 Congress codified the then existing immigration laws in one statute — the Immigration Act. 39 Stat. 874 (1917). The Act retained all of the prior grounds for inadmissibility, and added a literacy test as a "response to an influx of immigrants from southern and eastern Europe," who were believed to be "unassimilable." Report of the United States Commission on Civil Rights, *The Tarnished Golden Door*, 9 (1980). The 1917 Act also created the "Asia-Pacific Triangle," an Asiatic barred zone that was designed to exclude Asians completely from immigrating to the United States. H.R. Rep. No. 1365, *supra*; 1952 U.S. Code Cong. & Ad. News at 1665.

In 1921 Congress enacted a temporary quota law which limited the number of immigrants of any nationality to three percent of foreign-born persons of that nationality living in the country in 1910. *See* 42 Stat. 5 (1921). The intent of the 1921 quota was to restrict the bulk of immigrants to those of western and northern European stock. With the enactment in 1924 of the National Origins Act, Congress made the quota system permanent. Quotas for each nationality group were fixed at two percent of the number of that nationality residing in the United

[9]Not all attempts during this period to enact racially discriminatory immigration policies were successful. In 1914, the House of Representatives rejected a bill to exclude "all members of the African or the black race." *See* 52 Cong. Rec. 1138-39 (1914).

States as of the 1890 census. 43 Stat. 153, § 11(b) (1924). The Act also effectively closed the doors to Japanese immigration.[10]

B. Congress began to eliminate discriminatory immigration laws in the 1940's

Commencing in the 1940's and continuing through the early years of the 1950's, Congress began the process of reversing the discriminatory elements of our immigration laws. In 1943, the Chinese Exclusion Act was repealed, permitting a quota of Chinese to immigrate annually to this country, and declaring Chinese eligible for naturalization. 57 Stat. 600 (1943). In 1946 Filipinos and persons belonging to races native to India were declared eligible for naturalization. 60 Stat. 1353; 60 Stat. 416 (1946).

In 1952 Congress enacted the Immigration and Nationality Act (the "INA"), "a comprehensive, revised immigration, naturalization, and nationality code." H.R. Rep. No. 1365, *supra*; 1952 U.S. Code Cong. & Ad. News at 1653. One of the most significant provisions of the INA was "the elimination of race as a bar to naturalization and immigration." *Id.* at 1679. Indeed, congressional intent to eliminate race discrimination from our immigration laws was clearly stated:

> The [House Judiciary] committee strongly feels that the remaining racial exclusion clauses of our immigration and naturalization laws should be repealed and it has repeatedly indicated its belief that such repeal is long overdue.

Id. at 1736. In the view of one of the INA's sponsors, the statute as enacted "remove[d] the last vestige of racial discrimination against any race." 98 Cong. Rec. H4302 (Apr. 23, 1952) (remarks of Rep. Walter).[11]

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[10] The Act prohibited immigration of aliens ineligible for naturalization. The Supreme Court had previously ruled that Japanese were ineligible to become naturalized citizens. *Ozawa v. United States*, 260 U.S. 178 (1922).

[11] Despite the fact that some members of Congress believed that the INA eliminated race and national origin discrimination from our immigration laws,

Footnote Continued

C. Congress eliminated all discriminatory provisions in the immigration laws in 1965

The 1965 amendments to the Immigration and Nationality Act represented the most far-reaching revision of United States' immigration policy since the first Quota Act of 1921. Harper, *Immigration in the United States*, 21-22 (3d ed. 1975). In a single stroke, Congress eliminated discrimination based upon "race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a); P.L. 89-236.

The 1965 reforms, adopted contemporaneously with major civil rights legislation at a time of heightened congressional and public sensitivity to invidious discrimination in the domestic arena, clearly evidence the intent of Congress to implement neutral immigration policies, and "to eliminate the last vestiges of racial discrimination from our immigration laws." 111 Cong. Rec. S24446 (Sept. 20, 1965) (remarks of Sen. Fong); *see also* 111 Cong. Rec. H21772 (Aug. 25, 1965) ("the entire purpose of this legislation is to eliminate from our immigration laws discrimination based on geographic origin") (remarks of Rep. Poff).

As noted by Senator Fong, the history of American immigration law in the latter portion of the twentieth century is one of "tremendous progress toward removing racial restrictions in our immigration policies and practices. An outstanding milestone was the Immigration and Nationality Act of 1952." *Id.* Nonetheless, Congress recognized that "[p]rogressive as that 1952 law was, today it is very obsolete." *Id.* Accordingly, in 1965 Congress acted to "eliminate from the statute books a form of discrimination totally alien to the spirit of the Constitution. Distinctions based on race or national origin assume what our law, our traditions, and our common sense deny: that the worth

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Footnote Continued From Previous Page

other observers were less convinced. The Truman Commission concluded in 1953 that the INA embodied unwise and injurious policies, and that it discriminated on account of national origin, race, creed, and color. The President's Commission on Immigration and Naturalization, *Whom Shall We Welcome*, 263 (1953).

of men can be judged on a group basis." 111 Cong. Rec. S24483 (Sept. 20, 1965) (remarks of Sen. Kennedy). By amending the INA to eliminate racial and national origin discrimination, Congress attempted to insure that "our immigration laws ... be based on principle and be made a matter of clear and progressive law – equally applicable to all; not subject to caprice and winds of political pressure which can affect administrative judgment." 111 Cong. Rec. H21768 (Aug. 25, 1965) (remarks of Rep. Reid).

Significantly, at the time Congress was legislating to eliminate discrimination in the immigration laws, it was also acting to eliminate domestic discrimination. Indeed, the legislative history of the 1965 amendments to the INA is replete with eloquent statements affirming Congress' commitment to eradicate racial and national origin discrimination from all of our laws. For example, Senator Tydings of Maryland declared:

> Last year the Congress took a great step toward the elimination of racial discrimination against American citizens here at home. This year the Congress has passed legislation to do away with the last remaining obstacles to the attainment of the right to vote. This immigration reform bill is no less a civil rights measure. It will end four decades of intolerance toward those who seek shelter on our shores, and who, until they have actually sought entrance, have looked upon our Nation as a refuge and a haven from intolerance.

111 Cong. Rec. S24781 (Sept. 22, 1965). Similarly, one of the supporters of the amendments in the House commented: "Today, as we strive to eliminate discrimination within our borders, we will not – we must not – tolerate legalistic bigotry in our immigration policy." 111 Cong. Rec. H21778 (Aug. 25, 1965) (remarks of Rep. Krebs).[12] In sum, it is clear that when Congress amended the INA in 1965, it intended to rid the statute of all remaining discrimination based on race and national origin.

[12] *See also* 111 Cong. Rec. H21765 (Aug. 25, 1965) (remarks of Rep. Sweeney); *id.* at H21768 (remarks of Rep. Giamo); *id.* at H21783 (remarks of Rep. Burton); *id.* (remarks of Rep. Wolff).

D. Congress extended its mandate to eliminate all discrimination in the immigration laws when it enacted the Refugee Act of 1980

Further evidence of our nation's commitment to a non-discriminatory immigration law is found in the United Nations Convention (the "Convention") and Protocol Relating to the Status of Refugees (the "Protocol").[13] Article 3 of the Convention prohibits discrimination by signatory nations against refugees based upon race, religion, or country of origin.[14] When the Senate voted to accede to the Protocol, it understood that it was committing this nation to honor the non-discrimination provision of the Convention. Sen. Exec. Rep. No. 14, 90th Cong., 2d Sess., 1 (1968) ("if the United States accedes to the protocol, *it is automatically bound* to apply articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees").

Finally, the passage of the Refugee Act of 1980 represents the culmination of an evolving congressional consensus for a humanitarian, non-discriminatory immigration and refugee policy. By adopting the international definition of refugee, Congress once again affirmed its commitment to an immigration policy free from race and national origin discrimination. "Specifically, the [Refugee Act] amends the definition of refugee to eliminate current discrimination on the basis of outmoded geographical and ideological considerations." H.R. Rep. No. 96-608, 96th Cong., 1st Sess. at 1 (1979) (emphasis supplied).

The clear intent behind every congressional revision of our nation's immigration and asylum laws over the past thirty years has been the eradication of provisions which discriminate on the basis of race or national origin. Congress has systematically sought to assure that "our immigration laws [are] based on

[13] United Nations Convention and Protocol Relating to the Status of Refugees, *done* January 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577 (*entered into force with respect to the United States*, Nov. 1, 1968).

[14] In full, Article 3 of the Convention provides:

> Non-discrimination
>
> The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

principle ... and [are] equally applicable to all ...." 111 Cong. Rec. H21768 (Aug. 25, 1965) (remarks of Rep. Reid). In view of this clear congressional intent, it is equally clear that when Congress vested the Attorney General with discretion over parole of excludable aliens, it did not intend to authorize arbitrary executive discrimination based upon race or national origin. Such a result is inconsistent with the letter and spirit of Congress' actions.

CONCLUSION

For the foregoing reasons this Court should reverse the judgment of the Eleventh Circuit sitting *en banc* and reinstate the panel opinion below.

Respectfully submitted,

MICHAEL S. HOOPER
MUZAFFAR A. CHISHTI
WADE J. HENDERSON
National Coalition for
Haitian Refugees
275 Seventh Avenue
New York, New York 10001
(212) 741-6152

AMICUS CURIAE

BRIEF

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October Term, 1984

MARIE LUCIE JEAN, et al.,

Petitioners

vs.

ALAN C. NELSON, et al.,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE METROPOLITAN DADE COUNTY, THE CITY OF MIAMI, DADE COUNTY COMMUNITY RELATIONS BOARD, PIERRE TOUSSAINT HAITIAN CATHOLIC CENTER—ARCHDIOCESE OF MIAMI

IN SUPPORT OF REVERSAL

Lucia A. Dougherty,
City Attorney
City of Miami Law Department
169 E. Flagler St., Suite 1101
Miami, Florida 33131
(305) 579-6700
by: Gisella Cardonne,
Deputy City Attorney

Robert A. Ginsburg*
Dade County Attorney
16th Floor
Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130
(305) 375-5151
by: Dianne Saulney Smith,
Assistant County Attorney

Michelle B. Ivy, Esq.
12600 Griffing Boulevard
N. Miami, Florida 33161
(305) 895-6439

Counsel of Record

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of Metropolitan Dade County, the City of Miami, the Florida Bar Association Committee on Individual Rights and Responsibilities, Greater Miami United, Spanish-American League Against Discrimination, and the Dade County Community Relations Board. It is intended primarily as a community statement in support of equal and unbiased treatment of Haitian refugees. It takes no position on the claims of Haitian refugees for political asylum.

Dade County is a political subdivision of the State of Florida with broad home rule powers and is acutely sensitive to the negative effects which continued disparate treatment of the Haitian refugees has on the community.

The City of Miami is the most populous of the 27 municipalities within the Dade County area. It is a flourishing and active tri-ethnic community which shares Dade County's concerns that the discriminatory treatment accorded the Haitian refugees has adversely affected both the City and the entire South Florida community.

The Community Relations Board is an advisory board whose membership reflects the various social, racial, religious, linguistic, cultural, and economic groups which comprise the population of Dade County. It was created to foster mutual understanding, tolerance, and respect among all economic, social, religious and ethnic groups in the County. It supports the premise that Haitian refugees should be accorded equal and unbiased treatment.

The Pierre Toussaint Haitian Catholic Center is an agency of the Archdiocese of Miami which coordinates the Haitian ministry for the Archdiocese through South Florida. While primarily a pastoral center, the Center also directs a variety of educational programs and some social services. It is concerned that Haitians receive due process of law and that their claims to political asylum be fairly considered without prejudice.

HISTORICAL STATEMENT OF THE CASE

Political repression and poverty have driven Haitians from their country since Francois Duvalier assumed power in 1958. The upper class was the first to leave, but by 1964 the middle class also began the exodus. Their primary destination was New York City. South Florida's Haitian community began in the mid-1970s, grew slowly, then exploded in 1980.

The flight from Haiti's dismal political economy, dominated by less than one percent of its people, began to reflect all strata of Haitian society by 1971. Alex Stepick, Professor of Anthropology at Florida International University, summarizes conditions in Haiti as follows: "Poverty is extreme and pervasive; the Haitian government does virtually nothing to improve the general welfare of the masses, but rather exploits and exacerbates existing conditions; and repression is pervasive and triggered by the slightest imagined opposition."[1]

Since the Haitian boat people began arriving in southern Florida around 1971, the U.S. Government has been engaged in a ceaseless struggle to return expeditiously as many as possible to Haiti. The government contends that, while a few of the Haitians deserve asylum, the vast majority are economic, not political, refugees. They have dismissed as "frivolous" all but about a hundred of the Haitian claims for political

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[1]"Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy", Alex Stepick, Volume 45, Spring 1982, No. 2, Duke University Press, page 178.

asylum. Haitian refugees and their advocates assert the contrary: Haitian boat people are fleeing the political persecution of Duvalier-ruled Haiti; the U.S. Government's consistent denials of full and fair hearings for the Haitian boat people are racist, ideologically biased, and illegal under international and U.S. law.

The truth seems to be that most Haitian refugees, including those in South Florida, came for economic *and* political reasons. They are inseparable parts of the same persecution. They are fleeing a government that makes poverty an endless way of life, exploits its people, and ruthlessly silences the slightest real or imagined criticism of the Duvalier system.

The Haitians in our community are victims of a practice that clearly shows a favoritism by our government for those fleeing a Communist government over those fleeing a right-wing government. For 1975 and 1976, the last two years for which asylum statistics are available, the United States has granted asylum to 5% of those fleeing rightist regimes and 95% of those fleeing Communist countries.

In the most celebrated and comprehensive case about Haitian refugees, *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442 (S.D. Fla. 1980), Judge King's opinion was clear. He said:

> Haitians who came to the United States seeking freedom and justice did not find it. Instead, they were confronted with an Immigration and Naturalization Service determined to deport them irrespective of the merits of their asylum claims.

Id. at 532.

He dismissed the Government's contention that nearly all Haitians were merely seeking better economic conditions and faced no threat of political persecution upon return.

> The Court has seen a stark picture of how these plaintiff-immigrants will be treated if they return to Haiti. And it has seen an equally stark and even more troubling picture of the treatment of the Haitians by the Immigration and Naturalization Service.

Id. at 450.

The Haitian refugees who were the subject of the *Civiletti* case filed in 1979 had been incarcerated, denied the right to an attorney, denied fair hearings, denied the right to present witnesses, and summarily deported or kept in prisons awaiting the decision of the INS. "Indeed, in an earlier point in these proceedings, INS deported eleven refugees to Haiti pursuant to procedures that the government later agreed were faulty." *Louis v. Meissner*, 530 F.Supp. 924 (S.D. Fla. 1981). In spite of this treatment, Haitians chose to remain rather than accept the open offer of a ticket back to Haiti. They had left a place where they knew little but hostility, fear, and poverty. Many died on the 700-mile ocean voyage in small uncertain boats seeking sanctuary in this Country. Even though upon arrival they found little more than poverty, hostility, jail, and fear, they chose to remain and persevere.

On April 19, 1980, the Mariel boatlift from Cuba to Florida commenced, and brought more than 120,000 Cubans into South Florida within six weeks. Local media, and some national media, immediately noticed the blatant inconsistencies in the treatment of these refugees from Cuba and that accorded the Haitians. Charges of racial and ideological discrimination were leveled at the Carter Administration and the INS. In June 1980, President Carter responded with a promise of equal treatment and a temporary legal status of "Cuban-Haitian Entrant" for those who arrived before October 10, 1980.

There are approximately 25,000 Haitian "Entrants" throughout the United States. Most are in Miami. Contrary to the common stereotype of refugees, these people are not uneducated, unskilled, or from rural areas. They are highly motivated, anxious to educate themselves and willing to work hard. Nearly 70% came from urban environments in Haiti, and generally practiced semi-skilled trades there. They average more than seven years of education, though they come from a country where 80% of the people have no education at all. These people are not yet lawful immigrants, though they have an important place in our community. They have not been determined to be "refugees", nor has the U.S. Government granted them a permanent status allowing them the peace of mind most recently granted to Cuban "Entrants" who have been granted permission to apply for permanent residency status.

After the end of the Cuban-Haitian Entrant Program eligibility, Haitians continued to come to South Florida. By February 1981, INS had a backlog of 11,000 Haitian cases pending before them. From July 1980 through

March 1982, only nine Haitians were granted political asylum, out of some 5,000 applications on file, according to INS records.

Before July 1981, it was government policy to release most aliens from custody while their asylum claims were pending. Those who were held usually were detained because they posed a threat to public safety. But in July 1981, the Reagan Administration made a major and controversial change in policy that was felt deep in the heart of the South Florida community.

Krome Avenue Detention Center became the focus of this community's and the nation's attention. Reports of mistreatment and unrest in the camp made Dade County uneasy in its part as the site of this misery. Overcrowding, lack of facilities, and the denial of access to counsel became notorious and familiar to all who lived in South Florida. Black Americans protested the detention policy as discriminatory and inhumane. Demonstrations, marches, picketing, hunger strikes, and suicide attempts by some imprisoned Haitians assailed our consciences.

As a consequence of the negative reactions of the community, the Department of Justice reopened a Community Relations Service (CRS) office in Miami. Ozell Sutton, CRS Regional Director, cited the perception among blacks that Haitians were being treated unfairly as the cause of strained race relations in Dade County. Sutton said:

> The perception of unequal treatment of Haitians is aggravating an area already troubled relative to race. Miami has become a national focal

> point again. That started to change after the McDuffie riots in May 1980, but with this happening to the Haitians, national black leaders are coming in and raising awareness. The perception among blacks in Miami is that Cubans receive preferential treatment, and that Haitians are treated differently because they come from a black race.[2]

Leaders of more than two dozen civil rights, human rights, and religious organizations joined in a national coalition to protest the "inhuman" and "blatantly discriminatory" detention of 2,100 Haitian refugees.

Beginning on June 1, 1981, INS began another program of mass hearings. Up to forty Haitians at a time were led handcuffed into INS hearing rooms. At least once, the door was locked and an attorney from the Haitian Refugee Center was denied admission. Suit was filed, and on June 9, a stay order was issued by the U.S. District Court for the Southern District of Florida halting 85 scheduled deportations. *Louis v. Nelson*, Case No. 81-1260-Civ-EPS (June 18, 1982). Nevertheless, by June 15, 136 exclusion hearings had been conducted for Haitians in the Krome Detention Center.

In December 1981, a letter from the federal court went out to the Dade County Bar Association, the American Bar Association, and the New York City Bar Association requesting the assistance of the organized bar in an effort to secure volunteer attorneys to represent the Haitians detained by INS, and to help the Haitians

[2]Zaldivar, *The Miami Herald*, May 16, 1981.

file applications for political asylum if they so desired. In one short month, more than 200 *pro bono* lawyers in Dade County came forward to represent those Haitians in detention. Massive immigration training events were held, materials provided, translators hired, and representation secured for more than 500 Haitians in Dade County.

On June 18, 1982, Judge Eugene Spellman, United States District Judge, issued a ruling which found that the federal government had violated the Administrative Procedures Act when it changed its policy of freely paroling Haitians to a policy of incarcerating them while they litigate their claims for asylum. *Louis v. Nelson*, *supra*. He ordered them released. Subsequently, more than 1,700 Haitians were released into the supervision of five church groups and numerous individual sponsors.

The Dade County Bar Association and its Public Interest Law Bank found lawyers for more than 80% of those Haitians released who live in Dade County. Of the 1,700 refugees paroled from camps throughout the nation, less than 200 do not have a volunteer lawyer to help them. On February 10, 1984, the Dade County Bar Association and its Public Interest Law Bank received its highest honor from the ABA for "fidelity to the highest traditions of professional responsibility by serving as coordinator for the Haitian *Pro Bono* Project to secure legal representation for indigent persons seeking admission to the United States."

Yet, the barbed-wire detention center run by the U.S. Government on Krome Avenue in South Dade

County remains an ugly scar on our community. Today, some 400 Haitians who came in search of freedom remain confined there. They are segregated by sex in separate compounds. They sleep in rows of bunk beds in concrete block housing. Within the fences, large rock-encrusted fields are open to the use of the detainees. Some are in their second year of languishing behind the barbed wire.

South Florida, because of its geographical location and because of the political instability in the Caribbean and Central America, has special problems. It is the natural port of entry for people fleeing repressive governments. It has been so throughout history. But South Florida has a right to better treatment from the federal government, which has the sole authority and, therefore, the sole responsibility when it comes to immigration. The real issue is not a few Haitians in battered old sailboats. They have never been and never will be a threat to the welfare and security of this Country or of South Florida.

SUMMARY OF THE ARGUMENT

Haitians have been leaving their country for political and economic reasons since Francois Duvalier assumed power in 1958. They leave a country with a submarginal standard of living and a history of political repression under the Duvalier regimes. They have braved the hazards of a 700-mile ocean voyage on small, leaky boats to seek freedom and asylum in this Country.

The Metropolitan Dade community, a community made up of people from many other nations and cultures, has a deep concern that all people should be treated equally. The community is similarly concerned and outraged by the inequitable treatment meted out to Haitian refugees.

Inequitable and discriminatory treatment was extensively documented during trial. Parole has been routinely accorded other groups. However, Haitians have suffered detention for long periods of time under conditions that border on inhumane. Lower level immigration officials abused their discretion by exercising their authority in a disparate and discriminatory manner as to the Haitians in contravention of the Attorney General's intention that his policy be applied in an "evenhanded" manner. Therefore, temporary release from physical custody pending determination of asylum and final excludability must be granted.

ARGUMENT

I

Metropolitan Dade County, host community to most of the Haitian refugees, through its Board of County Commissioners and administration, has consistently and emphatically stated its position with regard to Haitian refugees, their treatment and the federal government's policy of detention.

In 1980, the Dade County Commission adopted a resolution which set forth its statement of policy as follows:

> WHEREAS, the United States, in keeping with its heritage as a refuge for the oppressed and persecuted, has welcomed and given blanket parole status to numerous thousands of Vietnamese, Cuban, and other refugees, and
>
> WHEREAS eight to ten (8 to 10) thousand Haitians have in the last many years risked their lives, crossing hundreds of miles of ocean in small boats and leaving their families, to flee repressive conditions in their homeland and seek political asylum in the United States,
>
> THEREFORE, be it RESOLVED that the Attorney General of the United States shall *immediately* grant parole—political asylum—to all Haitians presently in the United States who seek political asylum, and

> FURTHER be it RESOLVED that United States foreign policy, as it relates to Haiti, should have as its highest purpose, the easing of those conditions which cause Haitians to flee their homeland.

Dade County Resolution No. R-522-80 (April 15, 1980).

In 1982 the Commission by resolution urged "the federal government to take immediate action to alleviate the unsafe, unsanitary and potentially explosive situation at the Krome Avenue Detention Center."[3] Later that year another resolution was adopted in which it described detention of refugees as "illegal, inhumane and unacceptable."[4]

The County has stated that "a double standard in the treatment of Haitians will not be tolerated."[5] The peace and stability of the community demands equal treatment for the Haitians and a perception of fairness and justice by the populace, since the Dade County community is extremely sensitive to the perceptions or realities of disparities in treatment accorded the Haitians as compared to that accorded other groups seeking asylum in this country. It is in the public interest for Haitian refugees to be paroled into this country pending determination of their status in the same manner

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[3]Dade County Resolution No. R-1-82 (January 7, 1982).

[4]Dade County Resolution No. R-798-82 (June 1, 1982).

[5]Letter of February 16, 1984, from M.R. Stierheim, County Manager, to the Attorney General, William French Smith.

as other refugees. That is not presently the case. Almost without exception Haitian refugees who arrive on these shores are incarcerated at Krome for indeterminate periods while very few others are similarly treated. Presently at Krome Detention Facility are over 400 Haitians and a few of other nationalities.

The Dade County community is made up of people who "came originally from other nations, other cultures, from turbulent social upheavals in the cities of the United States and of the world," which "gives [the] community a deep conviction about fair and responsive government process, a determination that relations among governments as among persons must be open, honest and constructive, and a knowledge that the values of [the] community are inherently consistent with the values of [the] country and of [the] national government."[6]

The position of the City of Miami was stated at trial by the Honorable Maurice Ferre, Mayor. He read from a Resolution passed by the City of Miami Commission, the following:

> It is the opinion of the City Commission that the Haitians currently detained at the Krome Avenue Detention Facility and at other major facilities throughout the United States should be treated the same as other persons seeking refuge in the United States and should immediately be released from detention through such groups as the National Voluntary Resettlement Agency, church and other groups to families and sponsors in Miami and other parts of the United States.

[6]"Human Services to Haitian Aliens", Dade County Report, November, 1978, page i.

The Mayor testified " . . . there was indeed a differential in the way the Cubans were being treated and the Haitians." At first, the Administration informed the Mayor that " . . . they would not permit a different policy to be pursued for Haitians than for Cubans," In early 1981, however, a former INS Deputy Commissioner admitted, " . . . there was no question that there was a difference between the policy that dealt with Cubans and Haitians and that's the way it should be, the Haitians were not the same and should not be treated the same," to which the Mayor said, "I think that is a totally racist and un-American statement and I don't think that is something that fits in the tradition of our country."[7]

According to the statement of facts in *Louis v. Nelson*, 544 F.Supp. 973 (S.D. Fla. 1981), some 35,000 to 40,000 Haitians have arrived at our shores over the past ten years, an insignificant number when compared to that of Mexicans (over 200,000 every year) or the Mariel Cubans (125,000 over several months during the boatlift in 1980). Yet, only the Haitians are routinely detained. The message to the community is that only Haitians, Black people, will be denied the access rights and humane treatment accorded other groups.

It is particularly stressful and divisive to the Dade County community to see a group of people similarly situated to others singled out for disparate, inhumane

[7]Trial Transcript (T.) at 787, 788, 789.

treatment on the basis of their national origin or race. Tragically, the "policies and methods used to exclude or expel Haitians from the United States impinge directly upon the conscience, and upon the harmony of intergroup relations, of the varied peoples of the Greater Miami Community."[8]

II

In 1954, the new Commissioner of the INS decided that the policy of mass detention was "inhumane and unnecessary." *Jean v. Nelson*, 711 F.2d 1455, 1469 (11th Cir. 1983). The Supreme Court later "haled the [new] parole policy as one that exhibited the humane qualities of an enlightened civilization." *Id.* Parole remains humane; detention inhumane and unnecessary and when applied so inequitably, it is scandalous and an outrage to this nation of immigrants.

Since 1954 "[d]etention [has been] rare, and limited to those aliens who were likely to abscond, or who posed a threat to the national security." *Id.* Neither concern applies to the Haitian refugee. Yet "[l]eft without guidance as to how to implement an undefined policy, the immigration inspectors enforced the detention policy as if it was intended to apply solely, and uniformly, to Haitians." *Id.*

It is conceded that the Attorney General has broad discretionary authority in determining policy for the protection of these shores. Nevertheless, the authority is "not unlimited. It may be subjected to judicial scrutiny

[8] "Human Services to Haitian Aliens", page 3.

on a charge that discretion was arbitrarily exercised or withheld. I.C. Gordon & H. Rosenfield, *supra*, at §2.54." *Jean v. Nelson, en banc* at 975. Testimony from Attorney General William French Smith before Congress indicated that as to treatment of undocumented aliens, any policy which he developed would be "evenhanded." *Jean v. Nelson*, at 1471. The Eleventh Circuit *en banc* held that excludable aliens could not claim such equal treatment under the Fifth Amendment. However, the Attorney General's articulation of his intent that policy be applied by immigration officials in a non-discriminatory or "evenhanded" fashion requires just that. Otherwise they act outside the scope of their authority. *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982).

The court *en banc* left undisturbed the findings of the circuit court panel that plaintiffs had demonstrated "intentional government discrimination against Haitians." *Jean v. Nelson*, 711 F.2d 1455, 1494 (11th Cir. 1983). The panel stated at page 1501:

> We are left, then, with a strong case of discrimination essentially unrebutted by the government. Plaintiffs introduced statistical information based on data provided by the government, data which showed that class members suffered a grossly disparate impact of the new policy. . . . The government's case . . . consisted of nothing but 'mere protestation' and 'arguments of counsel.' These do not constitute rebuttal of a prima facie case of discrimination, especially one as strong as that proven by plaintiffs.

In the conflicting testimony of government witnesses as to whether there was a new policy or indeed what the policy was concerning detention and parole of aliens, there is evidence to be adduced from the Attorney General's testimony that whatever the policy, it should be "evenhanded." Undisputedly, the policy was applied in a blatantly discriminatory manner in violation of the expressed intent of the Attorney General. It is that arbitrary abuse of discretion by lower level immigration officials which resulted in grossly disparate treatment of Haitians and must not be tolerated. Furthermore, since the Court found that immigration officials in fact discriminated against the Haitians, remand is not necessary and this Honorable Court should grant the relief sought by Petitioners.

III

The problems of adjustment that confront most immigrant groups when they arrive in a new country are exacerbated for the Haitian refugees because of the uncertainty of their status and the hostile and disparate treatment they have been accorded by the government. "The imprisonment of Krome Haitians has had a tremendous and well-documented psychological impact upon them."[9] Yet, in spite of their plight, they remain optimistic and committed to this Country. A recent study by Dr. Alex Stepick[10] concludes that:

[9]"Haitians Released From Krome: Their Prospects for Adaptation and Integration in South Florida", March 2, 1984, page 12.

[10]*Id.* at 34.

> [T]he Haitians who are in South Florida have the education, training and skills to potentially contribute to American society. Moreover, they are firmly committed to remaining in the U.S. Only the most dramatic changes in both political and economic conditions might entice them to return to Haiti. Other evidence further indicates that if they were to return to Haiti they have a high likelihood of facing persecution by Haitian officials.

A study commissioned by Dade County and the City of Miami[11] revealed that English fluency is strong among the Haitians. Forty-five percent of all Haitians are enrolled in school, including 32% of the adults; and that 95% of school-aged Haitians are enrolled in school, including 90% between the ages of 16 and 19. By contrast, only 70% of the Dade County population between 16 and 19 are enrolled in school.

Clearly, Haitians are a people determined to improve themselves and contribute to this society. Furthermore, they are the least likely of virtually any other group in Dade County to be involved in felony arrests. The Dade-Miami Criminal Justice Council 1983 prepared a graph of felony booking rates per 10,000 of the population. That study indicated that Haitians comprised 45 bookings per 10,000 compared with 174 per 10,000 for Dade County as a whole, and 250 bookings per 10,000 population for the Mariel Cubans. Inquiry of the Dade County Corrections and Rehabilitation Department showed similar negligible involvement by Haitians.

[11]Demography, Social Status, Housing and Social Needs of the Haitian Population of Edison-Little River Prepared by Behavioral Science Research Institute, 1983.

CONCLUSION

The foregoing underscores Dade County's position that detention of Haitian refugees is unnecessary, inhumane, arbitrary and capricious. "Neither the Krome Haitians nor the Haitian Entrants (those who arrived before October 1980) are uneducated, unskilled, or from uniformly rural backgrounds. They have not come to the U.S. simply for economic reasons. By Haitian standards, they are not poor. They are highly motivated and anxious to improve themselves through education and hard work."[12] Most have relatives or friends already in the U.S. willing to help them. There is absolutely no reason why parole should not be accorded them, pending determination of their status, in the same manner it is accorded others. Justice and this community require no less.

Furthermore, the Eleventh Circuit Court *en banc* accepted the panel's findings of discrimination by lower level immigration officials and apparently accepted the Attorney General's position that any policy must be "evenhanded" or nondiscriminatory. Therefore, there is no need to remand to the district court for reconsideration of the issue that "lower-level INS officials abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors." *Jean v. Nelson*, 727 F.2d 957, 963 (11th Cir. 1984) (*en banc*). The finding has been made.

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[12]"Haitians Released From Krome: Their Prospects for Adaptation and Integration in South Florida", by Dr. Alex Stepick, March 2, 1984, page 4.

For the reasons stated and upon the authorities cited, relief sought by Petitioners should be granted.

Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney
16th Floor
Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130
(305) 375-5151

By_____
Dianne S. Smith
Assistant County Attorney

LUCIA A. DOUGHERTY,
City Attorney
Gisella Cardonne,
Deputy City Attorney
City of Miami Law Department
169 E. Flagler Street, Suite 1101
Miami, Florida 33131
(305) 579-6700

By: Gisella Cardonne
Deputy City Attorney

Michelle B. Ivy, Esq.
12600 Griffing Boulevard
N. Miami, Florida 33161
(305) 895-6439

AMICUS CURIAE

BRIEF

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No. 84-5240

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL.,
Petitioners,

v.

ALAN C. NELSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

DANIEL J. POPEO
GEORGE C. SMITH *
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240
Attorneys for Amicus Curiae Washington Legal Foundation

* Counsel of Record

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether unadmitted, excludable aliens may invoke the due process guarantees of the Fifth Amendment in connection with the grant or denial of parole, their detention pending determination of admissibility, or any aspect of the process governing their efforts to gain initial admission to the United States.

2. Whether the district court's finding of no discrimination against petitioners, which was not disturbed on appeal to the en banc Eleventh Circuit, was "clearly erroneous".

3. Whether broad theories of discrimination applied against the states in cases brought by citizens or resident aliens under the Fourteenth Amendment's equal protection clause have any bearing on claims brought against the United States by unadmitted, excludable aliens in connection with the process governing their initial admissibility to the United States.

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law center based in Washington, D.C., with over 80,000 members nationwide. WLF engages in litigation and administrative proceedings in matters affecting national legal policy and the basic rights of ordinary, law-abiding citizens. This brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 36.1.

The Foundation is strongly committed to the preservation of a firm and forceful national security policy for the United States. In keeping with that objective, WLF has participated in many of the most significant foreign policy and/or national defense cases decided by the courts in the past decade. E.g., *Goldwater v. Carter*, 444 U.S. 996 (1979); *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983). WLF has represented the interests of over 100 Senators and Congressmen in such cases, consistently urging the courts to reject efforts to turn our laws and Constitution against the country's own national security interests.

The constitutional issues posed in this case directly implicate United States national security and, more specifically, the government's sovereign power to control its own borders. Petitioners seek to entangle U.S. immigration authorities in a web of procedural obligations which would give excludable aliens every advantage in their efforts to secure an illegal foothold in the United States. They seek to introduce the complicating and disruptive factor of mandatory racial balancing into the already complex elements which must be considered in connection with alien entry procedures—a system which would open the door to endless judicial second-guessing as to immigration policy decisions which are no proper province of the judiciary.

However they characterize it, petitioners' arguments would turn every ministerial decision relating to the handling of inadmissible and excludable aliens into a constitutional case or confrontation. The sheer bulk of the additional INS workload engendered by petitioners' radical constitutional theory would force INS to either lower its vigilance in controlling unlawful entry or devote an inordinate amount of manpower and resources to defending claims of unconstitutional treatment. That is exactly the last thing this country's immigration service needs at this particular time.

The central fact is that petitioners' arguments would eradicate the longstanding distinction between the legal status of excludable alien and duly admitted resident alien. By arming the excludable illegal alien with a full array of constitutional entitlements regarding his entry application, the courts would push this country the last step toward complete surrender on the issue of unlawful alien entry.

The Constitution is no suicide pact, and therefore cannot be read to fatally compromise the nation's inherent power to regulate immigration in the purely national interest. Petitioners' argument would force the U.S. to compromise its national interest in firm and unfettered border control to satisfy a profoundly misguided notion extending constitutional rights to those who have no legitimate claim on them.

Accordingly, WLF believes it is urgently important for this Court to affirm the holding of the *en banc* Eleventh Cicuit that unadmitted, excludable aliens simply may not invoke the Fifth Amendment in connection with any aspect of their attempt to gain entry, including detention pending determination of status.

STATEMENT OF THE CASE

In the interests of brevity, *amicus curiae* adopts the statement of the case set forth in the brief of the Respondents.

SUMMARY OF ARGUMENT

1. The petitioners' attempt to eradicate the longstanding distinction between the constitutional status of resident aliens and unadmitted excludable aliens should be rejected by this Court. An unbroken line of precedents has established that an unadmitted alien may not invoke the guarantees of the Constitution, including due process, in connection with any aspect of his efforts to cross our

borders. The alien's application for parole, or his complaints regarding interim detention pending determination of admissibility, are subject to that same rule.

a.) Fifth Amendment due process has no bearing on these procedures because the alien approaching our shores has no cognizable liberty interest in being granted admission to the United States.

b.) The courts have no constitutional authority to interfere with Congress's plenary power to legislate rules governing all aspects of alien entry, or with the Executive's inherent sovereign power to control the national borders.

2. Petitioners' arguments based on the existence of "invidious discrimination" are completely invalid, lacking any factual predicate in this record. The District Court found no discrimination. The intermediate panel's "findings" of national origin discrimination were reduced to a nullity when the en banc court granted rehearing and vacated the panel decision.

The en banc court did not undertake to disturb the district court's finding of no discrimination. The district court's findings are not "clearly erroneous" under the standards consistently applied by this Court. Hence, petitioners' constitutional arguments have no foundation in fact.

3. In any event, petitioners' Title VII-style theory of "alien due process" is patently incompatible with the Government's sovereign prerogatives over the alien entry process. The Immigration and Naturalization Service cannot be burdened with inapposite considerations of "disparate impact", "standard deviations", and other arcane statistical criteria in performing its duty to control alien entry in the broad national interest. Petitioners cannot invoke constitutional guarantees which plainly have no bearing on their claim merely by raising the talismanic allegation of "discrimination."

ARGUMENT

I. THE FIFTH AMENDMENT MAY NOT BE INVOKED BY EXCLUDABLE ALIENS TO CHALLENGE THE GOVERNMENT'S EXERCISE OF THE PAROLE AUTHORITY OR ITS RELATED DETENTION POWER

This case calls into question the Government's inherent sovereign power to control its own borders. The influx of both legal immigrants and illegal aliens into this country has reached staggering proportions, and the capacity of our immigration authorities to cope with the administrative burden has become tenuous, to say the least. It will be strained to the breaking point if the unprecedented alien entitlements espoused by petitioners are ratified by this Court.

Traditionally, the United States has been able to accommodate its primary obligation to the welfare and security of its citizenry with its stature as the world's great beacon of freedom. The United States has often preferred to err on the side of liberality when these two great goals have come into conflict.

In times of genuine crisis, however, the Government must give primacy to the fundamental imperatives summarized in the Preamble to the Constitution: "insure domestic Tranquility, provide for the common defence, promote the general welfare."

Recent history confirms that hostile powers in the Western Hemisphere have the capacity to drive or dispatch large waves of excludable aliens to American shores, presenting our Government with the Hobson's choice between exclusion or mass admission. Whatever that choice may be, our Government should not be hampered with unmanageable and inappropriate legal constraints which effectively deprive it of sovereign authority in responding to such crises.

The petitioners in this case propose a new and radical theory of constitutional law which would have precisely

such an effect. They call on this Court to abolish the longstanding distinction between lawfully admitted aliens and unadmitted excludable aliens in terms of their constitutional status and standing. But that distinction is soundly derived from the Government's sovereign power to control its own national borders, and there is no tenable basis of constitutional law to justify such a fundamental reform of U.S. immigration regulation and policy.

A. The Immigration Crisis

The problem posed by the influx of over 27,000 excludable Haitian aliens into South Florida during the last decade is only a small part of a broader problem. (See *Report by the U.S. General Accounting Office: Detention Policies Affecting Haitian Nationals*, GAO Doc. GGD-83-68 (June 16, 1983), cited hereafter as "GAO Rpt.").

The fundamental fact is that a genuine immigration crisis exists in the United States. This was officially confirmed by the Select Committee on Immigration appointed by President Carter in a report issued in February, 1981 (Pet. App. A99).

The immigration crisis is the result of many factors—sudden infusions of refugee groups, persistent illegal immigration from Mexico and Central America, and the dangerous disparity between limited INS resources versus its crushing administrative workload—but the most troublesome problem has been the routine release of illegal aliens prior to a hearing on their admissibility. The released illegals then blend into the populace, fail to appear at their admission hearing, and demonstrate to the world the hopelessly ineffectual nature of U.S. controls over alien entry.[1] (There are now between 3 to 6 *million* illegal aliens residing in the United States (GAO Rpt., p. 2)).

[1] The Haitian refugees involved here, contrary to petitioners' mischaracterizations, have been extremely delinquent as a group in appearing for their exclusion hearings. In the period February 18 to July 16, 1982, 2,429 Haitians failed to report out of 3,311 who had been scheduled for hearings—a "no show" rate of over *70%*! GAO Rpt. at 15 and n. 4.

Once the illegal alien has thus gained entry, the odds against detection and ultimate deportation are long and difficult indeed. The overtaxed resources of the INS are rarely a match for the creative and diligent tactics of the legions of attorneys who specialize in thwarting exclusion, expulsion, and deportation. Even when INS is merely attempting to maintain a modicum of order and control in the process of admission, it is besieged at every turn by the hectoring writs of assertive aliens and their counsel. See generally *Louis v. Nelson* ("Louis III"), 544 F. Supp. 973, 978 (S.D. Fla. 1982).

Loss of control with respect to illegal immigration introduces a host of legal, social and economic problems which grow from within the body politic. Especially in times of recession or high unemployment—as prevailed during the height of the Haitian refugee influx—the social demands created by large groups of illegal aliens place an enormous strain on welfare, employment, and housing resources which are hard-pressed to meet the needs of the citizenry itself.

These fundamental concerns are inherent not only in the general restrictions Congress has placed on the immigration process, *Jean v. Nelson*, 727 F.2d 958, 971 (11th Cir. 1984), but in the basic sovereign prerogatives which govern the discretionary grant of parole to aliens who have not been formally admitted. As the *en banc* court stated below (*id.* at 971-72):

> The reason that Congress has passed legislation regulating the admission of aliens is its concern about how their entry will affect the economic, political, and social well-being of this nation. The grant of parole is subject to certain restrictions and is theo-

> retically of a short-term character, but it does permit the physical entry of the alien into the midst of our society and implicates many of the same considerations—such as employment and national security concerns—that justify restrictions on admission.

The court's recognition of the national security concerns which inhere in the regulation of alien parole raises another critical aspect of the immigration crisis. As demonstrated by the Mariel Boatlift of 1980, some hostile powers in this Hemisphere (e.g., Cuba and Nicaragua) are well-situated to exploit the porosity of U.S. admission policy by dispatching terrorists, criminals and other disruptive elements under cover of a wave of genuine refugees. Some 125,000 Cuban aliens entered the U.S. in connection with the Mariel process (GAO Rpt., p. 2); it will never be known how many were on missions of subversion devised in Havana.

It may be that the Haitian refugee group at issue was composed primarily of legitimate refugees—a proposition which shall remain unverified in light of the *court-ordered* release of thousands of them who subsequently failed to appear for their exclusion hearings. Be that as it may, the constitutional prerogatives which petitioners seek to establish in this case would give aid and comfort to the exported Libyan terrorist no less than to the meritorious Haitian refugee.

There should be no mistake: any decision undercutting the distinct treatment of unadmitted aliens confirmed in *Shaughnessy v. United States ex rel. Meizei*, 345 U.S. 206, 212 (1953), will only fortify the legal arsenal available to alien terrorists and criminals who seek to exploit porous U.S. entry restrictions. It will, indisputably, make it more difficult for INS and other law enforcement authorities to seal the borders against the growing international threat of terrorist infiltration and the broader problem of illegal immigration in general.

Accordingly, this Court should carefully recall its pronouncement in *Mathews v. Diaz*, 426 U.S. 67, 81 (1976), as it considers petitioners' entreaties to emasculate or overrule the long-settled *Meizei* doctrine:

> Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. [Citation omitted.]

B. The Courts Have Long Recognized the Government's Inherent Sovereign Power to Regulate Alien Entry Free of Inapposite Constitutional Constraints

Petitioners cloak their extraordinary arguments in the attractive and familiar garb of due process. They start with the unassailable proposition that due process is a treasured part of our constitutional system. Subtly and swiftly, they then shift to the sweeping proposition that due process constraints should be generously extended to govern every conceivable contact between the U.S. Government and a "person"—*any* person, *any* place, *any* time. (Pet's Br., p. 29.)

They do not specifically argue that a Coast Guard officer is constrained by the full range of equal protection doctrine—"suspect" classification, disparate impacts, "under-inclusive" classifications—in deciding what alien vessels to interdict off the shores of Florida, but their expansive Fifth Amendment theory leads inexorably to that result. Interdicting vessels, after all, is but the outermost extension of "government action" with respect to excluding inadmissible aliens from our borders.[2]

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[2] Thus, petitioners argue that "any person may invoke the Fifth Amendment to challenge action by the United States government, regardless of his immigration status and regardless of whether he is . . . inside the country, outside of it, or 'at the border.'" (Pet.'s Br., p. 29.) This contention is the core and premise of petitioners' case, and the Court will perceive its outlandish implications. It would not only entail absurd legal restrictions on border control and

In contrast to petitioners' novel and farfetched extensions of due process, the actual jurisprudence reflects only consistent and longstanding deference to the plenary discretion of the political departments in dealing as necessary with all aspects of alien entry. In fact, the courts have long acknowledged that the political departments are the exclusive arbiters of what process is "due" in connection with admitting aliens to U.S. territory. *Meizei*, 345 U.S. at 212.

As this Court observed in *Fiallo v. Bell*, 430 U.S. 787, 792, 795 (1977):

> [O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.
>
> • • • •
>
> We are dealing here with an exercise of the Nation's sovereign power to admit an excludable foreigner in accordance with the perceived national interest.

This Court and others have also repeatedly stressed that Congressional power to make policies and rules effecting the exclusion of aliens is "plenary" and "unqualified". *Kleindeinst v. Mandel*, 408 U.S. 753 (1982); *Boutilier v. Immigration and Naturalization Services*, 387 U.S. 118 (1967); *United States v. Gordon-Nikkhav*, 518 F.2d 972 (5th Cir. 1975). And when the Executive exercises its delegated power to exclude, within the parameters legislated by Congress, the courts will *not* look behind the exercise of discretion, nor test it against the constitutional claims of an unadmitted excludable alien. *Kleindeinst v. Mandel*, *supra*, 408 U.S. at 770. This is longstanding, black-letter law which in itself is dispositive of petitioners' claims.

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alien vessel interdiction, as illustrated above, but would apparently apply to the actions of U.S. intelligence agents or armed services personnel in combatting enemy agents or hostile forces abroad in the absence of a declared war.

Further, it is important to recall that the Executive's broad powers respecting alien entry do not derive solely from the delegation of Congressional power over immigration. It is instead an "inherent, sovereign power" respecting the preservation of national security, domestic tranquility, and a republican form of government. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 536, 542 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

In establishing the parameters of this case, the en banc Court of Appeals properly stressed the Government's inherent sovereign prerogative to exclude aliens. 727 F.2d 963-965. The unbroken line of precedents confirming this prerogative establish an unassailable foundation for the Attorney General's unreviewable discretion to grant or withhold parole to unadmitted aliens under 8 U.S.C. § 1182(d)(5)(A). As stated in *United States ex rel. Knauff v. Shaughnessy*, *supra*, 338 U.S. at 543, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."

Yet the alien petitioners are calling on this Court to interfere directly with the authority and ability of the Government to control the influx of excludable aliens. While they protest disingenuously that they "do not challenge the authority of the Congress, the President, the Attorney General, or even of [INS] to admit or exclude aliens", their disclaimer is belied by the whole thrust and substance of their claims.[3]

In fact, they seek to subject INS decisions respecting the exclusion and parole of aliens to the same form of judicial scrutiny that has been applied to education, employment, and housing whenever a question of "disparate

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[3] As the en banc Court recognized below, 727 F.2d at 975, petitioners' approach "would ultimately result in our losing control over our borders."

impact" is raised with respect to race, national origin, or any number of "suspect" classifications. Acceptance of their radical theory would entangle our border control procedures in the same web of civil rights "compliance" standards—e.g., disparate impact analysis, under-utilization criteria, affirmative action goals, and quotas—which have proven so burdensome in the employment context.

But the Constitution neither requires nor allows the courts to shackle the Government's sovereign border control prerogatives with such requirements. Even if all excludable aliens did constitute "persons" within the intent of the Fifth Amendment—a proposition which should be rejected for its excessive sweep—it would avail petitioners nothing here. The Government's power to exclude aliens, to grant or deny them parole, or to detain them temporarily in connection with such exclusion, *entails no deprivation of "life, liberty, or property" within the coverage of the Fifth Amendment.* No unadmitted alien is "at liberty" to cross United States borders, and therefore the due process clause simply does not come into play.

C. *Meizei* and Related Precedents Squarely Dispose of Petitioners' Claim and Should be Emphatically Reaffirmed

Since petitioners have no Fifth Amendment "liberty" interest with respect to their admission or exclusion at the border,[4] it makes no legal difference whether their putative constitutional claims are based on the actions of the Attorney General or the actions of lower INS officials at the ministerial level. For purposes of constitutional analysis, the dispositive fact is that their claimed rights are all based on the Government's actions incident to the process of admission or exclusion. That such actions are flatly immune from due process challenge at the instance of an unadmitted alien has already been firmly established in precedents of this Court. *Meizei*, 345 U.S. at 210-212; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Landon v. Plasencia*, 459 U.S. 21 (1982). This point is "engrained in our law", *Jean v. Nelson*, 727 F.2d at 968, and acceptance of petitioners' contrary arguments would radically revolutionize the whole corpus of U.S. immigration law.

[4] The Government's practice of placing unadmitted aliens in administrative detention pending determination of their admissibility/excludability is simply another aspect of the initial exclusion power. The only alternative is enforced expulsion. Thus, the Government's sovereign power to exclude encompasses the incidental action of temporary detention. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

The *Meizei* decision is directly on point—indeed, wholly dispositive—and petitioners' attempts to distinguish its holding away are utterly lacking in merit.

In *Meizei*, as here, the Court confronted a constitutional challenge to the Government's detention of an unadmitted, excludable alien—temporarily harbored within U.S. territorial limits—pending further proceedings respecting his ultimate disposition. An unchallenged exclusion order had already been entered in Meizei's case, and his detention was occasioned by the pendency of deportation proceedings. Here, the detention is occasioned by pending proceedings respecting petitioners' admissibility or exclusion. But the dispositive common thread is that in both cases an unadmitted alien was seeking to assert Fifth Amendment due process rights in connection with administrative detention pending disposition of status. Petitioners' attempt to obfuscate this critical point with a variety of inconsequential and strained distinctions should be rejected for the contrivance it is.

Accordingly, what this Court held in *Meizei* applies with the same force here (345 U.S. at 212):

> [A]n alien on the threshhold of initial entry stands on a different footing [from a duly admitted alien]:

> "Whatever the procedure authorized by Congress is, it *is* due process as far as an alien denied entry is concerned." . . . . And because the action of the executive officer under such authority is *final and conclusive*, . . ." it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government." In a case such as this, courts cannot retry the determination of the Attorney General.

The *Meizei* decision also squarely disposes of petitioners' argument that their status as *detainees* on U.S. territory gives rise to constitutional rights which would not attach to their claim to admission itself. As the Court stated, 345 U.S. at 215:

> [S]uch *temporary harborage, an act of legislative grace, bestows no additional rights.* . . . And this Court has long considered such temporary arrangements as not affecting an alien's status; *he is treated as if stopped at the border.* [Emphasis added.]

These petitioners, then, are in the selfsame legal position as aliens stopped at the border. As such, they have no liberty interest protected by the Fifth Amendment respecting the grant or withholding of parole.

It should also be reiterated that the *Meizei* decision is hardly an isolated source of authority for the unambiguous rule of law which disposes of petitioners' constitutional arguments.

There is no equivocation whatsoever in what this Court stated in *Kwong Hai Chew v. Colding, supra*, 344 U.S. at 600: " '[E]xcludable' aliens . . . are not within the protection of the Fifth Amendment."[5] The same black-letter principle was stressed by Justice Murphy, concurring, in

[5] Petitioners' attempt to dismiss this pronouncement as inconsequential *dicta* is not persuasive. On the contrary, the statement went to the heart of that case and this case: the fundamental distinction between the constitutional status of resident aliens versus unadmitted aliens.

Bridges v. Wixon, 326 U.S. 135, 161: "The Bill of Rights is a futile authority for an alien seeking admission for the first time to these shores." The basic distinction running through all these cases is that the due process rights petitioners seek to assert in connection with their claim for a temporary admission pass (in the form of parole) do not attach until they have crossed the critical "threshhold of initial entry", *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

These petitioners have *not* crossed the threshhold of admission to U.S. territory; it follows that their case is simply an attempt to invoke the entitlements of a status they have not achieved.

The clarity of the controlling precedents forces petitioners to resort to a disingenuous argument which manipulates semantics while ignoring logic and law. Since the Fifth Amendment's due process guarantees apply to "persons", and since excludable aliens are "persons" within the ordinary and literal sense of the term, they argue that those guarantees encompass "all persons wherever situated, including all aliens." Petitioners cite *Plyler v. Doe*, 457 U.S. 202 (1982), as recent authority supporting their position. They would have this Court draw the inference that recent cases like *Plyler*—dealing with the alien's distinct status and rights in the criminal prosecution context—somehow discredit the longstanding and straightforward *Meizei* holding that excludable aliens may not invoke the Due Process clause *with respect to any aspect or incident of their attempt to cross this country's borders.*

As demonstrated above, the inapplicability of due process guarantees to petitioners' claims to parole does not depend on a holding that they are not "persons" in the broader sense of the Fifth Amendment. It follows instead from the fact that they are not persons *who are threatened with any deprivation of "life, liberty, or prop-*

erty". The sovereign withholding of parole from aliens deprives them of nothing guaranteed by the U.S. Constitution.

Moreover, petitioners fail to note that *subsequent* to *Plyler v. Doe*—on which they strongly rely—this Court emphatically reaffirmed its numerous prior holdings that "an alien seeking initial admission to the United States . . . has no constitutional rights regarding his application." *Landon v. Plasencia*, 103 S.Ct. 321, 329 (1982). That unequivocal declaration of the law was made in full recognition of the prior dicta in *Plyler*, to the effect that aliens are "persons" under the Fifth Amendment. The *Landon* Court further reiterated that the alien's incapacity to invoke the Fifth Amendment in regard to the exclusion process derives from the fact that "the power to admit or exclude aliens is a sovereign prerogative." *Id.*

It is the sovereign's prerogative to control its borders which distinguishes the treatment of aliens' claims concerning the process of admission or exclusion (including parole or detention determinations) from their rights in the context of criminal prosecution or the deprivation of property. *Fiallo v. Bell*, 430 U.S. at 792, 795. It is that primary obligation of national government which would be gravely undercut if petitioners prevail here.

No plausible interpretation of our Constitution would require it to elevate the "rights" of unadmitted aliens at the expense of domestic tranquility, the common defense, or the general welfare of the Nation's citizenry. Yet that is exactly what petitioners' arguments entail.

II. THE DISTRICT COURT'S FINDING THAT THERE WAS NO INVIDIOUS DISCRIMINATION STANDS UNDISTURBED BY THE EN BANC REHEARING AND WAS NOT CLEARLY ERRONEOUS

Petitioners' arguments are all premised on the alleged existence of "invidious discrimination" in regard to their treatment at the hands of INS and its officials. They

repeatedly refer to what they characterize as the unquestioned findings of race or national origin discrimination *by the Eleventh Circuit panel*; and they call on this Court to direct the entry of "broad injunctive relief" in order to remedy this supposed discrimination.

As shown above, claims of alleged discrimination in connection with the grant or denial of parole are not constitutionally cognizable. The constitutional assurance of non-discriminatory treatment respecting race or national origin extends to all citizens and even resident aliens; but it does not go so far as to regulate the process of admitting aliens across U.S. borders. The Constitution and the Congress have left that process to the sound discretion of the Executive, and there is no indication that invidious discrimination is any part of U.S. immigration policy or practices.

But even if petitioners' contrary theory were valid, their arguments would still fail on the existing record of this case.

The only "finding" of invidious discrimination was made by the intermediate panel, which presumed to supplant the district court as trier of fact. The district court had found, on the contrary, that the government did *not* discriminate against petitioners on the basis of race or national origin. (Pet. App. A121-A122, A124.) The panel then invoked the "clearly erroneous" rule, *compare Pullman-Standard v. Swint*, 456 U.S. 273 (1982), to overturn portions of the lower court's findings as to discrimination. The panel overturned the lower court only on the absence of national origin discrimination; its apparent "finding" of such discrimination formed the basis of the relief it ordered (*id.* at A65-66 n.29 and A89-90).

However, the intermediate panel's "findings" of discrimination are no longer of any consequence in this case. When the full court of appeals granted rehearing *en banc*, it vacated the panel decision. Under well-settled juridi-

cal rules, *see* 11th Cir. Rule 26(k), the intermediate panel's decision was thereby rendered a nullity, of no force and effect.

The *en banc* court did not review or disturb the district court's findings of no discrimination. Accordingly, unless *this* Court should hold those findings "clearly erroneous", there is no factual basis whatsoever for petitioners' various theories of illegal or unconstitutional discrimination.

This Court has consistently applied the "clearly erroneous" standard with scrupulous deference to the first-hand findings of the trial court. *Pullman-Standard v. Swint*, *supra*; *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495-96 (1950). Here, the district court's detailed findings that there was no discrimination easily pass muster under those standards, and should not be disturbed. Accordingly, there is not even a factual predicate for petitioners' novel constitutional arguments.

III. PETITIONERS' TITLE VII-STYLE THEORY OF DISCRIMINATION HAS NO LAWFUL BEARING ON THE TREATMENT OF EXCLUDABLE ALIENS UNDER THE PAROLE AUTHORITY OR ANY ASPECT OF THE ADMISSION/EXCLUSION PROCESS

This Court will discern a familiar theme and pattern in the petitioners' allegations of "invidious discrimination" by the INS. The manipulation of statistics, the preoccupation with precise proportional representation among racial or national categories, and the inevitable discovery of a "disparate impact" has all the earmarks of the kind of "across-the-board", "pattern and practice" employment discrimination suit which once dominated Title VII litigation.[6] Indeed, petitioners present this case precisely as

[6] While petitioners seek to extend the EEO-style theory of across-the-board, statistical-based discrimination into the wholly inapposite context of alien admission procedures, this Court has imposed substantial restraints on the use of such broad theories even in the employment discrimination context. *E.g., Memphis Firefighters v. Stotts*, 104 S. Ct. 2576 (1984); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Hazelwood School Dist. v. U.S.*, 433 U.S. 299 (1977).

though the INS was an employer and they were black American citizens seeking jobs, instead of excludable aliens seeking the privilege of parole pending determination of admissibility.

In short, petitioners' case attempts to subject the Government's treatment of aliens at the border to the same rigorous standards required by Title VII and related laws in the employment context. Cloaking their claims for unprecedented alien entitlements in the garb of U.S. employment discrimination law, they proceed as though the Attorney General's parole decisions were subject to the full panoply of standards developed (and since considerably narrowed, see n.6, *supra*) under the 14th Amendment's Equal Protection Clause and derivative laws such as Title VII. They then call on this Court "to enter broad injunctive relief to remedy the invidious discrimination"—presumably expecting some form of "goals", quotas, or affirmative action program to be imposed on the alien parole process.

Of course, the principles and precedents invoked by petitioners have no legal bearing whatsoever on the Government's decisions respecting the admission, exclusion, or detention of unadmitted aliens. But it is quite instructive that petitioners' arguments are dependent upon a standard litany of domestic discrimination cases concerning the obligations of employers, educational institutions, and housing authorities. *E.g., Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *Swann v. Charlotte-Mecklenburg Board*, 402 U.S. 1 (1971). Simply by invoking the talismanic phrase "invidious discrimination", petitioners proceed as though such an

allegation automatically calls into play the full range of broad equal protection remedies which extend to the life, liberty, and property interests of citizens and, in appropriate contexts, resident aliens.

But the invocation of high-sounding slogans does nothing to alter the fact that petitioners are seeking a sovereign dispensation—i.e., parole into the United States prior to lawful admission—in which they have no life, liberty, or property interest that would implicate constitutional rights. Petitioners are actually contending that the Government's decision on their parole is subject to the same strict equal protection standards that apply in cases of state action affecting "suspect classifications" under the Fourteenth Amendment. The short answer to their argument is the same as that stated by this Court in *Mathews v. Diaz, supra*, 426 U.S. at 86-87:

> [T]he predicate for the equal protection analysis in those cases is simply not present. Contrary to appellees' characterization, it is not "political hypocrisy" to recognize that *the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.* [Emphasis added.]

Since there was "no predicate" for the equal protection analysis advanced in *Mathews v. Diaz*, it surely follows that the more adventurous arguments raised here are groundless. Diaz at least was a lawful resident alien, claiming that it was discriminatory to provide federal Medicare benefits to five-year resident aliens but not to aliens with lesser residence time. But even though resident alien status gives rise to constitutional rights in some contexts, those rights do not apply to every demand made by an alien on this Nation's government. As stated in *Diaz*, 426 U.S. at 80:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor

> the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. [Emphasis in original.]

Accordingly, this Court dismissed the equal protection claims of even a resident alien by simply affirming

> . . . that it is the business of the political branches of the Federal Government, rather than that of either the States *or the Federal Judiciary*, to regulate the conditions of entry and residence of aliens. [426 U.S. at 84; emphasis added.]

Here, in complete disregard of the foregoing principles, petitioners insist that the federal judiciary must regulate the conditions of alien entry in the most pervasive and disruptive manner imaginable. Not content with abolishing the long-settled distinction between the rights of duly admitted aliens and aliens seeking admission, petitioners go much farther; they claim for the latter an exacting standard of equal protection which this Court declined to apply even in favor of *resident* aliens in *Diaz*, 426 U.S. at 84-87.

Aside from the fact that petitioners' equal protection theories simply do not apply to their demands for parole, their arguments could not prevail even if equal protection standards were assumed to have some bearing on the case. The standards of discrimination they propose are simply incompatible with the Government's compelling and fundamental interest in maintaining effective control over alien entry.

As illustrated by their own brief, petitioners would require INS to assure that no racial or national category of aliens was disproportionately affected in the process of admitting, excluding, or paroling aliens. Thus, they insist that the Constitution cannot tolerate a "disproportionate" or "disparate" impact upon Haitian aliens resulting from INS parole practices (Pet.'s Brief pp. 11-15). Unless the

results of INS admission and parole procedures conform to the rigors of "binomial analysis", "standard deviations", and other arcane statistical paradigms, its decisions to admit or deny entry would be subject to the same kind of "broad injunctive relief" which petitioners seek here.

In short, the Government's control over its borders would be held hostage to the same standards of "disparate impact" and "underutilization" which have mired U.S. employers in burdensome and endless litigation under Title VII. The national interest criteria which have always governed immigration practice and policy—national security, economic and social factors, likelihood of non-disruptive assimilation—would have to be subordinated to the exacting demands of statistical discrimination theory. Court-ordered "goals" and "timetables", to assure a fair allocation of immigration benefits along racial lines, would not be far behind.

It is clear that petitioners' theory of equal protection for unadmitted aliens is incompatible with the Government's plenary sovereign prerogatives in controlling alien entry and parole. "We are dealing here with an exercise of the Nation's sovereign power to admit an excludable foreigner in accordance with the perceived national interest." *Fiallo v. Bell, supra*, 430 U.S. at 795. The perceived national interest in the field of alien entry control simply cannot be subordinated to considerations of "disparate impact" on any racial or national category of aliens.

Accordingly, this Court should reject petitioners' attempt to undermine the authority of the political departments in their efforts to regain control over our besieged borders.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Eleventh Circuit's en banc holding that excludable aliens have no constitutional rights with respect to their applications for admission, asylum, or parole.

Amicus also respectfully urges the Court to order the dismissal of this entire action as an unsustainable attack on the Government's reasonable exercise of discretion in withholding parole; or, in the alternative, to adopt the position stated in the partial dissent of Judge Tjoflat (otherwise concurring), 727 F.2d at 984-86, urging a more narrow standard to govern the district court's review of the Attorney General's parole discretion on remand.

Respectfully submitted,

DANIEL J. POPEO
GEORGE C. SMITH
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240
Attorneys for Amicus Curiae
Washington Legal Foundation

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, *et al.*,
Petitioners

v.

ALAN C. NELSON, COMMISSIONER IMMIGRATION & NATURALIZATION SERVICE, *et al.*,
Respondents

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMICUS CURIAE FEDERATION FOR AMERICAN IMMIGRATION REFORM IN SUPPORT OF RESPONDENTS

ROBERT E. JENSEN
Counsel of Record
WILLIAMS & JENSEN, P.C.
1101 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 659-8201
Attorney for Amicus Curiae Federation for American Immigration Reform (FAIR)

BARNABY W. ZALL
1424 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 328-3308

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a class of excludable aliens held in detention and refusing to leave the United States while they are seeking admission to the United States may invoke the Fifth Amendment to challenge the Attorney General's exercise of his authority to detain them pending a determination of their admissibility.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-5240

MARIE LUCIE JEAN, *et al.*,
Petitioners

v.

ALAN C. NELSON, COMMISSIONER IMMIGRATION & NATURALIZATION SERVICE, *et al.*,
Respondents

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMICUS CURIAE FEDERATION FOR AMERICAN IMMIGRATION REFORM IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Federation for American Immigration Reform (FAIR) is a nonprofit membership corporation founded in 1978 for the purpose of educating the general public concerning the economic, social, environmental, demographic and other effects of immigration into the United States. FAIR seeks, *inter alia*, to enhance the ability of

the United States to control illegal immigration into this country. The outcome of the present case could increase the flow of illegal immigrants to the United States. Accordingly, FAIR takes this opportunity to express to the Court its views on the issues presented in this case. Both parties have consented in writing to the submission of this brief.

STATEMENT OF CONTEXT

This case comes before the Court at a time when immigration to the United States is at or near the highest level in our history and increasing rapidly. A substantial portion of this flow is made up of illegal aliens, people who have circumvented American immigration laws to enter or remain in this country. The phenomenon of illegal immigration has grown to such proportions in recent years that many Americans fear our immigration policy is "out of control". Select Commission on Immigration and Refugee Policy, *United States Immigration Policy and the National Interest: Report of the Select Commission on Immigration and Refugee Policy*, G.P.O. March 1981, P. 10 (Remarks of Chairman Father Theodore Hesburgh). In 1981, Attorney General William French Smith testified before Congress that "our policies intended to effect the necessary control of our borders have failed. . . . We have lost control of our borders." Statement of Attorney General William French Smith, *Administration's Proposals on Immigration and Refugee Policy*, Joint Hearing before the House Subcommittee on Immigration, Refugees and International Law and the Senate Subcommittee on Immigration and Refugee Policy, 97th Cong. 1st Sess. July 30, 1981, P. 6.

FAIR offers this Statement of Context because of its belief that pressures for further migration from other countries are growing and that the decision in this case could well encourage illegal immigration into this country at the very time current executive, legislative, and other efforts are being vigorously pursued to secure precisely the opposite objective. To explain this concern requires a brief discussion of recent data respecting immigration.

In 1980, when Petitioners arrived in the United States, over 800,000 legal immigrants and refugees were admitted to the United States by federal immigration authorities, more than twice as many as were admitted for permanent resettlement by the rest of the world combined. LeMaster & Zall, "Compassion Fatigue: The Expansion of Refugee Admissions to the United States," 6 BOSTON COLLEGE INT'L. & COMP. L.R. 447 (1983); Select Commission on Immigration & Refugee Policy, *United States Immigration Policy and the National Interest*, *supra*, 10 (March 1981).

In addition, the United States has recently experienced a large inflow of illegal entrants. The number of apprehensions of illegal entrants by the Immigration and Naturalization Service has exceeded one million in each of the last two years, up from 756,000 a decade ago. Briggs, *Immigration Policy and the American Labor Force*, Johns Hopkins Univ. Press, Baltimore, 1984, 132; U.S. Dept. of Justice, *Press Release*, September 15, 1984, P. 1; "Report: 1 Million Aliens Stopped by Border Patrol," *The Miami Herald*, Sept. 17, 1984, P. 19A, Col. 1. The actual number of illegal immigrants residing in the United States is not known with accuracy, but estimates range into the millions. Comptroller General of the United States, *Report to the Congress: Number of Undocumented Aliens Residing in the United States Unknown*, General Accounting Office, Rept. GGD-81-56 (April 6, 1981). Perhaps more immigrants have come to the United States illegally than legally in recent years.

As Justice Brennan observed in *De Canas v. Bica*, 424 U.S. 351 (1976), illegal immigration harms the United States and its people:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on

> substandard terms as to wages and working conditions of citizens and legally admitted aliens; and employment of illegal aliens can diminish the effectiveness of labor unions.

Id. 424 U.S. at 356-7.

Congress has enacted a comprehensive series of laws designed to control and limit immigration and the harm which uncontrolled immigration can cause this country. 8 U.S.C. §§ 1101, *et seq.* (1982). Unfortunately, as the Attorney General recognized, those laws are not working as they should. Congress has undertaken strenuous efforts to revise and reform those laws, most recently in the form of the Simpson/Mazzoli immigration reform bill which passed both the Senate and House of Representatives in 1983 and 1984, but which was not enacted in final form. *See, e.g., Cong. Rec.* (Daily Ed.) June 11, 1984 Pp. H5529-H5583; June 12, 1984 Pp. H5593-H5670; June 13, 1984 Pp. H5681-H5788; June 14, 1984 Pp. H5802-H5871; June 15, 1984 Pp. H5906-H5919; June 19, 1984 Pp. H6032-H6079; June 20, 1984 Pp. H6088-H6185.

The national debate over immigration reform is vitally important, since the so-called "push factors" fueling increased immigration, including high fertility rates, relatively youthful populations and the inability of national economies to accommodate the large population increases, are projected to increase in the coming decades. Fox, *Population Issues and the Face of Change in Latin America*, Inter-American Development Bank, Reprint Series No. 119, Pp. 76, 79 (1982). As these push factors intensify, so does the pressure to come to the United States. Briggs, *supra*, at 257.

With visa quotas for most major source countries of immigration already oversubscribed, U.S. Dept. of State, *Monthly Visa Bulletin for November 1984, reprinted in Interpreter Releases*, November 9, 1984, P. 951, the growing pressure for migration will manifest itself in increased illegal immigration into this country.

There are potentially tens of millions of aliens who desire to immigrate to the United States. Most do not qualify and do not try to come here. Others, however, attempt to come here illegally and then use any available legal process to remain in the United States.

Doris Meissner, Acting Commissioner of Immigration and Naturalization, explained the problem to a Congressional hearing this way:

> For a long period of time, it has been apparent that the present exclusion, deportation and appeal procedures are both too complex and too time-consuming. From the time a person is first charged with being excludable or deportable to the time the process has been completed after the exhaustion of various judicial appeals, an alien will often have remained in the United States for several years. Excludable or deportable aliens are thus able to manipulate the immigration law with little risk, as simple administrative and legal maneuvers may gain them several extra years in the United States. This procedural morass has also had an adverse effect on the persons charged with the enforcement of the immigration laws, and on our court system, because great amounts of time and resources may be expended to establish deportability or excludability, without any progress being made toward the actual expulsion of the alien.

Asylum Adjudication, Hearings before the Senate Subcommittee on Immigration and Refugee Policy, 97th Cong. 1st Sess. Serial No. J-97-66, P. 11 (October 14, 1981); *see also*, Statement of Acting Commissioner Doris Meissner, *United States As a Country of Mass First Asylum*, Hearing before the Senate Subcommittee on Immigration and Refugee Policy, 97th Cong. 1st Sess. 14-15 (July 31, 1981).[1]

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[1] The Fifth Circuit Court of Appeals recently recognized this problem. *Ramirez-Osorio v. INS*, 745 F.2d 937, 946 (5th Cir. 1984). "Such frivolous claims not only add administrative burdens but also imperil the identification of non-frivolous claims." *Id.*

This problem of using asylum claims or lengthy immigration adjudication procedures to remain in a country without eligibility is not confined to the United States. The United Nations High Commissioner on Refugee's Subcommittee on International Protection recently reported that "the number of unfounded claims [for asylum] has become disproportionally high and . . . a significant percentage of such claims are to be considered as manifestly unfounded or abusive." Subcommittee of the Whole on International Protection, "Follow-Up on Earlier Conclusions of the Subcommittee," *The Determination of Refugee Status with Regard to the Problem of Manifestly Unfounded or Abusive Applications*, Executive Committee of the High Commissioner's Programme, 34th Sess., EC/SEP/29, P. 2 (August 26, 1983). The report notes that these asylum claims are submitted "as a means of circumventing normal immigration regulations." *Id.*

Most other Western democracies have also discovered that, as they tighten their already stringent immigration policies, they receive increasing numbers of asylum applications and appeals to immigration appeals courts. Canada's immigration authorities recently reported that Canadian asylum processes have been used "by some individuals to prolong their stay in Canada even though there is no basis for their claim." Ministry of Employment and Immigration, *Immigration Levels, 1983-85: Questions and Answers*, P. 23 (November 1, 1982).

The international concern over this situation reached such proportions by 1983 that the German Marshall Fund convened an international conference of immigration ministers to discuss the situation. German Marshall Fund, "Session II, Adjudicating Asylum Claims," *Summary of International Conference on Common Problems in Administering Immigration and Refugee Problems*, Washington, D.C., June 8, 1983. At the conference, ministers from the Federal Republic of Germany, Italy, France, Canada,

Australia, the United States, and the United Kingdom exchanged views and information on asylum abuse. *Id.*

The report from the Federal Republic of Germany was typical: asylum applications increased sharply after the recruitment of foreign workers was halted in 1973. Government officials found that the "asylum process was being abused to circumvent restrictions on worker immigration." *Id.* at p. 11 (Statement of Dr. Eckert Schiffen, Ministerial Director for Refugee and Humanitarian Affairs). A United Nations High Commissioner for Refugees official surveying the same situation previously found that:

> [A] significant number of the [asylum] applicants took advantage of the asylum procedures for purely economic reasons, since even those whose claims were obviously unfounded were entitled to stay and work in the country until their applications were finally rejected. This, however, could be up to five years, or even longer.

Henkel, "International Protection of Refugees," *In Defense of the Alien*, Vol. V, Proceedings of the 1982 Legal Conference on Refugees and International Asylum, March 25-26, 1982, Center for Migration Studies, New York, 1983, P. 62.

The opportunity for such abuse in asylum processing stems from the compromises between national sovereignty and humanitarianism necessarily contained in generous immigration laws. "The history of immigration laws in the United States is a tale of accomodation between the humanitarian goal of accepting into this country those immigrants who seek to build a new life here and a variety of reasons for restricting immigration." *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 452-3 (E.D.Fla. 1980), *modified sub nom., Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). "How we got to that point is a rather long and complicated story, but it has to do with a variety of attempts on the

part of the government to put fairness into a system which has developed quite recently." Statement of Acting Commissioner Meissner, *Asylum Adjudication*, *supra*, at p. 19.

Enlarging an alien on parole pending the outcome of such lengthy proceedings is an enticing prospect if one considers only the goal of more humane treatment for aliens. Unfortunately, "[t]he United States has never been able to keep any group of persons, no matter how ill-suited for immigration, temporarily in this country without eventually making those people permanent residents." LeMaster & Zall, *supra*, at 469; *see, also, United States as a Country of Mass First Asylum*, *supra* (Statement of Acting Commissioner Meissner: "Once individuals are resettled into the community, the likelihood of their eventual removal if they are not found to be entitled to remain here diminishes.")

Many commentators, here and abroad, believe that the solution to the asylum abuse problem is speedy and final asylum processing. *See, e.g.*, Statement of Professor David Martin, *Asylum Adjudication*, *supra* at Pp. 126-7: ". . . the most effective possible deterrent to people who would come and file borderline or frivolous asylum applications is going to be the ability promptly to say no in those cases, and then to enforce promptly the resulting order by returning them to their home countries"; Statement of Minister for Employment and Immigration Lloyd Axworthy, *Immigration Levels, 1983-85*, *supra*, at P. 23: "I am convinced that the solution to this problem is a system of refugee determination that will enable a final decision to be made quickly. This would remove the incentive for abusive claims and alleviate the hardships valid claimants now face.".

Congress has wrestled with the appropriate mechanisms for reform in this area for several years. The Reagan Administration presented wide-ranging proposals to Congress in 1981. *Asylum Adjudication*, *supra*.

During the Congressional debate on the Simpson/Mazzoli immigration reform bill, reform of asylum and adjudications processing received substantial inquiry and repeated votes. Some Congressional debate focussed on the central question in this case—the rights of excludable aliens to release from detention—and Members discussed the lower court's opinion. *Cong. Rec.* (daily ed.) Pp. H5735-H5747 (June 13, 1984) (Ottinger, McCollum and Ackerman Amendments).

The Ottinger Amendment was offered as "a perfecting amendment to correct an inequity in the bill pertaining to the right of refugees and aliens to bring class action suits for review of orders of deportation, exclusion and asylum." *Id.* at H5736. Cong. Ottinger described the holding in the lower court: "This decision makes it virtually impossible to bring any class action suits on behalf of asylum seekers under the bill." *Id.* The Ottinger Amendment restoring the rights of aliens to bring class action proceedings passed by voice vote, *Cong. Rec.* (Daily ed.) P. H5738 (June 13, 1984), but was reversed by the passage of the McCollum amendment immediately thereafter. *Cong. Rec.* (Daily ed.) P. H5740 (June 13, 1984).

The McCollum Amendment was offered "to streamline the [immigration adjudications and asylum] process by creating a fair, yet expeditious, procedure which fully meets the requirements of due process." *Cong. Rec.* (Daily ed.) P. H5739 (June 13, 1984). Cong. McCollum stated that he had two concerns about the adjudications structure in the Simpson/Mazzoli bill:

> The retention of multiple layers of review, which will delay and hinder the workings of the adjudication system, and the failure to maintain the 'summary exclusion' provisions of the original Simpson/Mazzoli bill . . . [W]here there is no claim for asylum, no documents presented, and no reasonable basis for legal entry into the United States, we should turn them away summarily just as we do

> when they approach our embassies and consuls abroad or seek refugee status without meritorious claim. Otherwise, we can never regain control of our borders."

The McCollum Amendment, addressing the same issues as this case, passed the House of Representatives twice. *Cong. Rec.* (daily ed.) June 13, 1984 Pp. H5738-H5743; *reconsidered and re-adopted*, June 20, 1984 Pp. H6148-H-6149.

An even clearer indication of Congressional interest in this question is the Ackerman amendment. The Ackerman Amendment dealt:

> [W]ith the prolonged and sometimes unending detention of those who arrive on our shores, fleeing tyranny and persecution because of race, religion, politics, or nationality and claim asylum in the land of liberty. We in turn throw them in jail.
>
> In jail they can languish and rot with almost no guidelines or clue as to when they can get out.

Cong. Rec. (daily ed.) H5746 (June 13, 1984).

The Simpson/Mazzoli bill required that an alien detained pending asylum adjudication proceedings be released on parole if the Immigration and Naturalization Service does not determine the alien's status within a short time, unless the Attorney General specifies a reason to continue holding the alien. *Id.* The Ackerman Amendment did not apply to excludable aliens, only to those awaiting asylum determinations while inside the country. *Cong. Rec.* (daily ed.) H5747 (June 13, 1984).

The Ackerman Amendment passed by voice vote. The Senate, during its consideration of the immigration adjudications process, amended the Simpson/Mazzoli bill to include the "speedy trial" provisions for the Immigration and Naturalization Service, *Cong. Rec.* (daily ed.) Pp. S6832 (May 17, 1983), S6938 (May 18, 1983), but did not consider the Ackerman Amendment appeal-level "speedy trial" question.

Thus, Congress is currently engaged, as part of a sweeping review of the immigration adjudications provisions of the immigration laws, in a vigorous debate over the very question this Court is now asked to resolve. FAIR is participating in that ongoing debate. *See*, Morris, *Immigration—The Beleagured Bureaucracy*, The Brookings Institution, Washington, D.C. 1985, 28-9.

Congress, with its plenary power over immigration, is the appropriate body to determine how best to balance the rights of aliens who have not yet entered the United States against the need to protect the United States and its people from the harsh effects of uncontrolled immigration. If Congress decides to require the Executive Branch to exercise the parole power delegated to it in a strictly nondiscriminatory manner it may do so. This case, however, should not be used as a vehicle to accomplish that end.

FAIR believes that a decision in this case which places any additional restrictions on the ability of the Executive branch to exercise the authority over excludable aliens delegated to it by Congress will only exacerbate a problem already out of control—the problem of illegal aliens entering the country and the inability of the government efficiently and in a timely fashion to get them out. As other nations around the world have discovered from their own experiences, if the United States expands the rights of aliens, it will receive an increasing number of aliens claiming those rights.

SUMMARY OF ARGUMENT

The Eleventh Circuit decision below was correct in both its analysis of the law in this area and the application of the law to the facts of this case. The decisions of this Court are clear that the "entry doctrine"—which holds that aliens who are detained while seeking admission to the country have fewer rights to challenge immigration decisions than aliens who have already entered the United States—is still valid. Applying the entry doctrine in this case demonstrates that Petitioners have no

constitutional rights to challenge the decisions of the government as to their entry or parole into the United States.

Petitioners, in their analysis of the law in this situation, fundamentally misunderstood the immigration law as it relates to the temporary admission of aliens to the United States under the Attorney General's "parole power." This error invalidates their analysis of modern immigration law, since it ignores Congressional and Administration policy since 1980.

I. THE DECISION OF THE ELEVENTH CIRCUIT IS CORRECT AND SHOULD BE AFFIRMED.

A. The Eleventh Circuit Correctly Assessed the State of the Law.

1. *Control over national borders is a necessary attribute of sovereignty, long recognized as possessed by the United States.*

The foundations of the immigration laws and sovereign power of the government over immigration have been examined in detail by the Eleventh Circuit and will not be repeated here. Amicus FAIR will reiterate only that Congress' power over immigration is plenary. *Carlson v. Landon*, 342 U.S. 524, 534 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Harisiades v. Shaughnessy*, 342 U.S. 580, 586-7 (1952). "Over no conceivable subject is the legislative power of Congress more complete." *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

Congress has made extremely broad delegations of power to the Executive branch, under which the President may stop the entry of all or any group of aliens into the United States or impose any conditions he deems necessary on the entry of aliens (8 U.S.C. § 1182(f) (1982)), and the Attorney General may allow any alien to enter the United States temporarily without altering the alien's status under the immigration laws (8 U.S.C. § 1182(d)(5)) (the "parole power").

The comprehensive character of the immigration laws circumscribe the ability of the Executive to exercise any authority independent of that granted by Congress. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The Eleventh Circuit's analysis of the law in this area was correct.

2. *The "entry doctrine" is the controlling legal theory in this case.*

No case has ever held that aliens have constitutional rights to challenge decisions about entry to the United States before they have actually entered the United States. Aliens have been held to have Due Process and Equal Protection rights under the Fifth Amendment if they are forced to leave the United States once they have entered, *Yamataya v. Fisher*, 189 U.S. 86 (1903) (The Japanese Immigrant Case), but they have far fewer rights before they have made an entry into the United States. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"); *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953) ("'excludable' aliens . . . are not within the protection of the Fifth Amendment").

This distinction between aliens' rights before and after entry, known informally as the "entry doctrine," has existed since the turn of the century, before most immigration laws were developed. *Yamataya v. Fisher*, *supra*.

The entry doctrine has been repeatedly applied by this Court in circumstances nearly identical to this case. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) ("The Petitioner, although physically within our boundaries, is to be regarded as if he had been stopped

at the limit of our jurisdiction, and kept there while his right to enter was under debate.").

The entry doctrine, as applied to excludable aliens held pending a decision on their status, has its basis in the intention of Congress to protect the United States and its people against uncontrolled immigration. *Jean v. Nelson*, 727 F.2d 957, 971 (11th Cir. 1984) (en banc) (hereinafter "*Jean*"). The general rule of immigrant admissions is that aliens seeking to immigrate to the United States must apply from abroad. 8 U.S.C. § 1202. Giving aliens who ignore this requirement and arrive here illegally more rights than those who comply with our laws and seek admission from abroad is an invitation to illegality.

Some aliens are allowed to enter the United States as an exercise of generosity, "a device through which needless confinement is avoided." *Leng May Ma v. Barber*, *supra*, 357 U.S. at 188; *Shaughnessy v. Mezei*, *supra*, 345 U.S. at 215. This process, known as deferred inspection or "parole," is expressly authorized by Congress, 8 U.S.C. § 1182(d)(5)(A), though limited to aliens who are not "refugees." 8 U.S.C. § 1182(d)(5)(B). Parole, however, is not to have any effect on the status of the alien applicant for admission. 8 U.S.C. § 1182(d)(5)(A).

By creating the parole option, Congress sought to balance the need to provide a thorough examination of the alien's right to enter the United States with a belief that an alien who posed no threat to the United States or its people need not be detained indefinitely. *Leng May Ma v. Barber*, *supra*. Congress was upholding the general rule of immigration cited above by making the exercise of discretion to admit aliens from abroad the exceptional situation.

Parole is not to be automatically exercised for every alien who enters illegally and then requests parole. In fact, excessive use of the parole authority was a major reason for the enactment of the comprehensive Refugee

Act of 1980. Act of March 17, 1980; P.L. 96-212; 94 Stat. 109. As then-Attorney General Griffin Bell pointed out during consideration of the Refugee Act:

> The number of refugees admitted through use of the parole power have become far greater than was contemplated by Congress. This authority, . . . has the practical effect of giving to the Attorney General more power than the Congress in determining limits on the entry of refugees into the country. The bill transfers the responsibility for refugee policy decisions to the President in consultation with the Congress.

House Committee on the Judiciary, *The Refugee Act of 1979*, 96th Cong., 1st Sess. Rep. No. 96-608, P. 11. Thus, Congress decided that the Attorney General need not grant parole to every alien, but could decide for whatever reasons he deemed convincing that an alien or a group of aliens could be denied parole, and required that some groups of aliens *not* receive parole. 8 U.S.C. § 1182(d)(5)(B).

Congress specifically made grants of parole discretionary. 8 U.S.C. § 1182(d)(5)(A). The Eleventh Circuit, during its lengthy exploration of this question, pointed out one of the major reasons for that grant of discretion: an alien on parole is at liberty in the country with little chance of being forced to return to detention; "an alien with a skilled attorney can delay the exclusion process for years, and aliens who choose to abscond face only a minimal risk of apprehension." *Jean*, 727 F.2d at 971, n.20. In light of the experiences of other countries in similar situations, as outlined in the Statement of Context above, the Congressional choice was appropriate.

Parole, since it does not affect an alien's status for purposes of determining the alien's rights to admission, does not negate the entry doctrine. Thus, though aliens may have certain constitutionally-protected rights if they enter the United States, even illegally, aliens who have

not yet entered the United States, including those who have been admitted to United States territory on parole, do not have the same rights to challenge the immigration decisions which deny them entry.

As recently as two terms ago, this Court upheld the entry doctrine. *Landon v. Plasencia, supra.* Although the validity of the entry doctrine was an issue in at least two of the earlier decisions which led to review in this Court, *Louis v. Meissner*, 544 F.Supp. 973, 998 (S.D.Fla. 1982); *Jean v. Nelson*, 711 F.2d 1455, 1484-85 (11th Cir. 1984), the Eleventh Circuit correctly noted that the entry doctrine is still a viable theory controlling the status of the petitioners in this case. "Plaintiffs here can claim no greater rights or privileges under our laws than any other group of aliens who have been stopped at the border." *Jean*, 727 F.2d at 969.[2]

3. *Excludable aliens do not have Constitutional rights to challenge immigration decisions.*

The Eleventh Circuit's decision that ". . . excludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right", *Jean*, 727

[2] Petitioners are not contesting the right of the government to detain excludable aliens pending determination of their admissibility. Pet. at 15, n.8. The federal government's power over immigration has long been held to include the power to detain aliens pending a decision of whether the alien has the right to enter the United States. *Shaughnessy v. Mezei, supra.* "Proceedings to *exclude* or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation." *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (emphasis added).

The Eleventh Circuit correctly noted that decisions on parole implicate many of the same considerations of protecting the United States and its people as do the decisions on exclusion which this Court has recognized as allowing detention of aliens. "Parole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter by land." *Jean*, 727 F.2d at 972.

F.2d at 972, is in accord with the long, unbroken line of decisions by this Court cited above. In *Landon v. Plasencia, supra*, Justice O'Connor summarized these cases by noting that: "an alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." 459 U.S. at 32.[3]

If Petitioners had sued to be admitted to the United States while still in Haiti, the refusal to admit them could not be challenged on Constitutional grounds. The fact that the Haitians arrived on our shores by boat does not alter the fact that they are seeking a privilege, the granting of which is a sovereign prerogative. As the Eleventh Circuit noted, parole and admission decisions are identical in a number of important respects and therefore excludable aliens cannot challenge either decision under a claim of constitutional rights. *Jean*, 727 F.2d at 972.

B. The Eleventh Circuit Correctly Applied The Law to the Facts of This Case.

Petitioners are excludable aliens who are waiting for final processing of their applications to be admitted to

[3] Petitioners, citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), claim that a decision upholding the Eleventh Circuit would remove excludable aliens from the protection of the Constitution. The Eleventh Circuit did not, as Petitioners allege, hold "that a class of persons is wholly beyond the Constitution." Pet. at 14. The Eleventh Circuit correctly noted that excludable aliens seeking entry to the United States do have rights, both statutory and constitutional, in a variety of circumstances. *Jean*, 727 F.2d at 968, 972-3.

The Eleventh Circuit was quite specific on its holding: that excludable aliens have no constitutional rights to challenge their *admission or parole* into the United States. *Id.*, 727 F.2d at 972. "[I]mmigration officials clearly have the authority to deny parole to unadmitted aliens if they can advance 'a facially legitimate and bona fide reason' for doing so." *Id.*, 727 F.2d at 977. That holding is in accord with the decisions of this Court.

the United States. *Jean*, 727 F.2d at 969; *Louis v. Meissner*, 544 F.Supp. at 998. They arrived in this country illegally and were validly detained. As was shown above, they are thus unable to claim constitutional rights to challenge decisions on their admission or parole. *Jean*, 727 F.2d at 972.

Petitioners are not claiming constitutional rights as to their entry, however, but as to their detention. They claim that incarceration, though concededly valid if "evenhanded", is not valid if conducted discriminatorily. Pet. at 15, n.8.

The Eleventh Circuit rejected the claim that the government may not discriminate on the basis of nationality in the immigration area, as inconsistent with repeated exercises of such power. *Jean*, 727 F.2d at 978, n.30. For instance, the President has the power, delegated from Congress, to stop any alien or any or all classes of aliens from entering the United States, even if the choice were made on the basis of nationality. 8 U.S.C. § 1182(f). The Eleventh Circuit view is correct. *See, e.g., Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979), *cert. den.*, 446 U.S. 947 (1980).

That is not to say that Petitioners or other excludable aliens have no rights. The Eleventh Circuit did recognize that Petitioners might have grounds for a review of actions of the Immigration and Naturalization Service under other grounds. *Jean*, 727 F.2d at 978-9. It remanded for a further review to determine whether immigration officials conformed to the policy decisions made by those with the authority to make distinctions on the basis of nationality. *Id.* If unsanctioned discrimination on the basis of national origin by authorized immigration officials was discovered, the Eleventh Circuit found that "such conduct would constitute an abuse of discretion that would justify appropriate relief." *Id.* at 979.

C. There Is No Valid Reason to Alter the State of the Law in This Area.

There is no indication in this case that the controlling doctrines involving the powers of the government need alteration, nor that the entry doctrine, the detention of excludable aliens pending admission decisions or the constitutional rights of excludable aliens need to be changed. In all four areas, the decisions of this Court, though many were issued decades ago, appropriately address the current concerns of the country and its people in a manner completely consistent with the Constitution.

As pointed out in the Statement of Context of this brief, Congress has recognized the international problem posed by increasing numbers of abusive immigration claims and is engaged in a debate about the best method to improve the situation. This Court can best serve the interests of the Nation by clearly and definitely reaffirming those legal doctrines and principles which guided the Eleventh Circuit's decision. The rights of aliens are adequately protected by the safeguards crafted by Congress in the Immigration and Nationality Act.

II. PETITIONERS FUNDAMENTALLY MISPERCEIVE THE NATURE OF "PAROLE" AND ADMISSION TO THE UNITED STATES.

A. Contrary to Petitioners' Assertions, There Is No Difference Between "Temporary Parole" And "Substantive Parole."

Petitioners have articulated a dichotomy that does not exist: "The word 'parole' has two entirely separate meanings in immigration law. Only temporary parole is involved here." Pet. Brief at P. 6, n. 10. Petitioners offer no definition of "temporary parole;" there is no such term in modern American immigration laws.

Petitioners contrast "temporary parole" with "substantive parole." Pet. Brief at P. 31. Again, Petitioners offer no definition of "substantive parole;" again there is no such term in modern American immigration laws.

This distinction is crucial to Petitioners' claim. They argue that:

> Temporary release on parole is simply not tantamount to admission, factually or legally. Temporary release from incarceration (parole) is a distinct event from admission, and provides neither the benefits of admission nor any legal status equivalent even to that of a visitor temporarily admitted. *Leng May Ma v. Barber*, [*supra*], 357 U.S. at 190.

Pet. Brief at P. 32.

B. Petitioners Apparently Meant Asylum Or An Obsolete Form of Refugee Admissions Instead of "Substantive Parole."

Petitioners have confused "substantive parole" and "admission" with the mechanisms used to admit refugees prior to the Refugee Act of 1980, *supra*. Prior to the creation by the Refugee Act of 1980 of new mechanisms to admit and resettle refugees, the admission of refugees was either by the exercise of the Attorney General's parole power (8 U.S.C. § 1182(d)(5)) or under special legislation. *E.g.* The Fair Share Refugee Act; Act of July 14, 1960; P.L. 86-648; 74 Stat. 504. Asylum in the United States was similarly granted through the Attorney General's parole power. *INS v. Stevic*, 467 U.S. ——; 104 S.Ct. 2489, 2498-99 (1984).

Prior to the Refugee Act, the number of aliens admitted as "refugees" was expressly limited, forcing use of the parole power to admit large groups of refugees, even in emergencies. 8 U.S.C. § 1153(a)(7) (1965); *see, INS v. Stevic, supra*, at 2498-99. Since many refugees admitted under the parole power were not allowed to become permanent residents of the United States, Congress repeatedly passed special legislation allowing groups of refugees to adjust their status to permanent residence. *See, e.g.* Cuban Adjustment Act of 1966; Act of November 2, 1966; P.L. 89-732; 80 Stat. 1161.

This repeated use of the "parole" power by the Attorney General was one of the driving forces behind passage of the Refugee Act of 1980. House Committee on the Judiciary, *The Refugee Act of 1979*, 96th Cong., 1st Sess. Rep. No. 96-608, P. 11.

The Refugee Act of 1980 was intended to create:

> a coherent and comprehensive U.S. refugee policy. This objective is accomplished by creating a systematic and flexible procedure for the admission and resettlement of refugees. . . To create a truly comprehensive approach to refugees, the committee has determined that any new statute must consolidate admissions and resettlement policies.

The Refugee Act of 1979, supra, at Pp. 1, 6.

Congress, in the Refugee Act, replaced the earlier limited refugee admissions provision, 8 U.S.C. § 1153(a)(7), with three new provisions designed to replace parole as the regular admissions process for refugees. 8 U.S.C. §§ 1157, 1158, 1159 (1980).

These new provisions were joined with an amendment to the Attorney General's parole power designed to restrict substantially the use of the parole power for aliens who could be admitted as refugees:

> The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section [1157].

8 U.S.C. § 1182(d)(5)(B).

None of Petitioners' references to the parole power mention this new restriction on parole. Nor do Petitioners mention the other provision which they confused with "substantive parole": asylum under 8 U.S.C. § 1158 or 8 U.S.C. § 1253(h).

Asylum has long been available in the United States to aliens who would be persecuted or harmed if they were returned to their homelands. *INS v. Stevic, supra.* Asylum is close to what Petitioners meant by "substantive parole." Under asylum, an alien who cannot return to his homeland is allowed to remain in the United States indefinitely. The alien is not granted all of the privileges of permanent residence; for example, asylees cannot petition the government for the admission of relatives, and they may be returned to their homelands when the Attorney General determines that it is safe to do so. 8 U.S.C. §§ 1153(a), 1158. Only 5,000 asylees each year may be granted permanent residence in the United States. 8 U.S.C. § 1159(b).

Yet Petitioners' claims about "substantive parole" would not ring true if applied to asylum. There is no right to asylum and Congress intended that the Refugee Act supersede the use of parole for asylum applicants. *INS v. Stevic, supra.* Thus there cannot be constitutional rights to claim asylum similar to those Petitioners claim for "substantive parole"; that is, prior to a grant of asylum.

C. Petitioners Misperceive The Nature of Parole.

It is unclear where Petitioners believe they would go if released from detention if not into the United States. Yet they claim that their release from detention would not be an "admission" to the United States, and does not provide "the benefits of admission". Pet. Brief at 32.

Aliens released into the United States from detention are free to join the population, subject only to a requirement that they return when required to do so. In practice, since the government does not have the ability to remove aliens from the United States, their release is tantamount to admission; the government will not remove the aliens from the United States and they almost inevitably receive permanent residence here. *See* Pp. 5-8, *supra.*

Petitioners appear to believe that release from detention on "temporary parole," as opposed to release from detention on "substantive parole" of apparently longer duration, would be costless. Pet. Brief at 32-33. This belief that the Nation and its people are not affected by the unlimited entrance of aliens into the United States, whether by parole or illegal entry, is wrong. This Court has already noted the pernicious effects of unauthorized immigration. *De Canas v. Bica, supra.*

The Eleventh Circuit recognized this dilemma as well. It discussed the effects of parole, *Jean*, 727 F.2d at 971, and pointed out that parole "does permit the physical entry of the alien into the midst of our society and implicates many of the same considerations—such as employment and national security concerns—that justify restrictions on admission." *Id.*, 727 F.2d at 972.

Petitioners join a number of observers who proclaim that the border is porous, so aliens who enter can stay under a claim of right unless the government can prove some substantial reason to keep them out of the country. Anker & Posner, *The Forty-Year Crisis: A Legislative History of the Refugee Act*, 19 SAN DIEGO L.REV. 9, 75-89 (1981); *The Right of Asylum Under United States Law*, 80 COLUM. L.REV. 1125 (1981). Such an attitude ignores the effect of uncontrolled immigration on the United States and its people, and misreads international law. LeMaster & Zall, *supra*, Pp. 455, 465-66, 468.

Petitioners' position would require the government to release all aliens from detention unless it holds all other

aliens in similar circumstances. In that situation, the government would have to prove any exception with a degree of precision which would be extremely burdensome. Few aliens arrive with enough documentation or records to allow the government to prove that their release would be dangerous or harmful.

The Eleventh Circuit addressed this problem:

> In the probable absence of any reliable information about such aliens beyond what they cared to provide, could the government meet its burden under some judicially-imposed standard of showing that indefinite detention was justified? It seems unlikely.

Jean, 727 F.2d at 975.

Congress recognized this dilemma when it made parole discretionary, and then restricted the power further in 1980. The decisions of this Court indicate that parole is a benefit granted to an alien, not a right that an alien may demand absent some reason for its abeyance. *Leng May Ma v. Barber, supra.*

As demonstrated in the Statement of Context above, immigration officials around the world are increasingly concerned about the ability of aliens to enter a country illegally, claim rights to benefits and then prolong expulsion for many years. Congress and the Administration are wrestling with this problem in the United States.

This Court should not now give the Petitioners a constitutional right to demand free access to this country so long as the government cannot prove that they are not a danger.

CONCLUSION

The Eleventh Circuit's analysis of the law in this area and of the application of the law to the facts of this case were correct. There is no reason to alter either the law or its application here. Petitioners' position is based on fundamental confusion over the application of the relief which they request. Any other decision would interfere with the continuing governmental debate on immigration reform. For these reasons, Amicus FAIR respectfully requests this Court to affirm the Eleventh Circuit decision.

Respectfully submitted,

ROBERT E. JENSEN
Counsel of Record
WILLIAMS & JENSEN, P.C.
1101 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 659-8201

BARNABY W. ZALL
1424 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 328-3308

Attorney for Amicus Curiae Federation for American Immigration Reform (FAIR)

RESPONDENT'S

BRIEF

No. 84-5240

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In the Supreme Court of the United States

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL., PETITIONERS

v.

ALAN C. NELSON, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

BARBARA L. HERWIG
MICHAEL JAY SINGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners, a class of excludable Haitian aliens seeking admission into the United States, may invoke the Fifth Amendment to challenge the exercise of the Attorney General's authority to parole unadmitted aliens into this country pending a determination of their admissibility.

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In the Supreme Court of the United States

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MARIE LUCIE JEAN, ET AL., PETITIONERS

v.

ALAN C. NELSON, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (J.A. 292-354) is reported at 727 F.2d 957. The vacated opinion of the court of appeals panel (J.A. 193-291) is reported at 711 F.2d 1455. The pertinent opinions of the district court (J.A. 113-174 and 78-100) are reported at 544 F. Supp. 973 and 532 F. Supp. 881.

JURISDICTION

The judgment of the en banc court of appeals (J.A. 356-357) was entered on February 28, 1984. A petition for rehearing was denied on May 4, 1984 (J.A. 355). The petition for a writ of certiorari was filed on August 1, 1984, and was granted on December 3, 1984 (J.A. 358). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. 8 U.S.C. 1182(d)(5)(A) provides:

> The Attorney General may, except as provided in subparagraph (B), in his discretion, parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

STATEMENT

A. Background and Proceedings Below

1.a. Section 235(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225(b), provides that "[e]very alien * * * who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer." Section 212(d)(5)(A) of the Act, 8 U.S.C. 1182(d)(5)(A), modifies this detention mandate by authorizing the Attorney General, "in his discretion," to parole into the United States any alien applying for admission "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." The statute makes clear, however, that such parole "shall not be regarded as an admission of the alien" and that the alien shall be returned forthwith to

custody when, "in the opinion of the Attorney General," the purposes of the parole have been served (*ibid.*).

b. In February 1981, the Select Committee on Immigration established by President Carter issued a report declaring that an immigration crisis exists in the United States (J.A. 120). Principal reasons for the crisis included the arrival on our shores of increasing numbers of aliens lacking required entry visas and a policy under which such undocumented aliens were routinely paroled prior to hearings on their applications for admission. As a result, further illegal immigration was encouraged (*id.* at 118-120 & n.17) and aliens often failed to appear at their hearings (4/1/82 Tr. 2398-2399). See also GAO, *Detention Policies Affecting Haitian Nationals* 15 & n.4 (1983) (hereinafter GAO Rep.). The flood of undocumented aliens included an estimated 35,000 Haitians who arrived and were paroled into South Florida between 1972 and 1981, and some 125,000 Cubans who arrived in the region in the spring of 1980 in a massive "boatlift" orchestrated or permitted by Cuban authorities originating in Mariel Harbor (J.A. 118-120).

Because of the continuing immigration crisis confronting the Nation, in March 1981 President Reagan appointed a special cabinet-level task force, presided over by the Attorney General, to consider solutions to the pressing problems involved. The task force developed several responsive policy proposals. Among these was a recommendation that the government return to a general policy of detaining incoming aliens unable to support their claims for admission to this country (J.A. 120-122). A policy of detention of such aliens had been applied by the government during the 1940s and early 1950s but was largely abandoned following 1954, when the detention facility at Ellis Island was closed and the Attorney General began to exercise his parole authority more leniently, allowing most undocumented aliens to be at large within our borders pending appropriate immigration proceedings in which their admissibility would be determined (*id.* at 122 n.18).

On July 30, 1981, the President issued a statement concerning the Nation's immigration policy, emphasizing the need to " 'establish control over immigration' " and indicating that the Attorney General would be taking measures to ensure that aliens are admitted to the United States " 'in a controlled and orderly fashion . . .' " (J.A. 123). On the same day, the Attorney General testified before a joint hearing of the Senate and House subcommittees with jurisdiction over immigration and refugee matters. He advised Congress of the severe problems in the immigration area, noting that the Nation has " 'lost control of [its] borders,' " has " 'pursued unrealistic policies,' " and has " 'failed to enforce [its] laws effectively' " (*ibid.*). He further testified that the government's effort to regulate the entry of aliens has " 'crumbled under the burden of overwhelming numbers' " (*ibid.*). In outlining a remedial strategy, the Attorney General underscored the " 'necessity of detaining illegal aliens pending exclusion' " (*ibid.*).

Consistent with these pronouncements, a key element of the new immigration policy endorsed by the task force, approved by the President and announced by the Attorney General "called for more restrictive use of parole and increased use of detention" (J.A. 123). The Immigration and Naturalization Service (INS) implemented this "new" policy (which in many ways was a return to the "old" pre-1954 policy embodied in the Immigration and Nationality Act) by issuing "general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission" (*id.* at 124).[1]

[1] An "excludable" alien is an alien subject to exclusion under the Immigration and Nationality Act who has been stopped by INS officials at the border and who therefore has not effected an entry into the United States. A "deportable" alien, by contrast, is one who has managed—legally or otherwise—to enter the United States, and is, by virtue of such entry, no longer subject to exclusion proceedings but only to deportation proceedings. See, *e.g.*, *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958); see also *Landon* v. *Plasencia*, 459 U.S. 21, 25-26 (1982). Petitioners are agreed to be excludable aliens; this case presents no question concerning the rights of aliens who have managed to effect an entry into the United States.

By July 31, 1981, then, the "new" policy of more restrictive use of parole was initiated with respect to excludable aliens generally, including the continuing stream of arrivals from Haiti (*id.* at 125). See also GAO Rep. 15-16.

2. This litigation was commenced by filing of a petition for a writ of habeas corpus (J.A. 14-23) in the United States District Court for the Southern District of Florida on June 10, 1981. An amended petition combined with a complaint for declaratory, injunctive and mandatory class action relief (*id.* at 24-46) was filed on June 16, 1981. Defendants and respondents included the Attorney General, the INS, the Commissioner of Immigration and Naturalization and several regional and local INS officials. The complaint, which was amended on August 24, 1981 (*id.* at 49-56), set out seven causes of action. Among these was a claim that respondents had treated Haitian aliens differently from other groups of aliens in connection with their detention and other matters relating to their applications for admission, and had thereby discriminated against petitioners on the basis of race and national origin, in alleged violation of the Fifth Amendment (J.A. 38-39).

On September 30, 1981, the district court (Hastings, J.) granted petitioners' motion for class certification and converted a temporary restraining order (entered simultaneously, "NUNC PRO TUNC to September 9, 1981") into a preliminary injunction barring the government from proceeding with exclusion hearings against members of the class (J.A. 58-59). As later modified (*id.* at 82 (footnote omitted); see also *id.* at 176, 294 n.2), the certified class

> consists of all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United

States and who are presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are either: (1) unrepresented by counsel; or (2) represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association.[2]

On February 24, 1982, the district court (Spellman, J.) dismissed many of petitioners' claims on jurisdictional grounds (J.A. 78-100). Petitioners' surviving claims were then as follows: (1) Count II, which alleged that the change in the government's parole policy was unlawfully effectuated without observance of the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA), 5 U.S.C. 553; (2) Count IV insofar as it alleged violations of a First Amendment right of access by detained Haitians to persons not in detention, and by the Haitian Refugee Center, Inc., to persons in detention, and (3) Count VII insofar as it challenged the revised parole policy as discriminating on the basis of race and national origin in alleged violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

3. Following a trial, the district court issued findings of fact and conclusions of law (J.A. 112-174) on June 18, 1982. The court ruled in petitioners' favor on the APA claim, holding that the revised parole policy should have been promulgated in accordance with the notice-and-comment rulemaking procedures (*id.* at 150-159).

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[2] In its final judgment, the district court further modified the class certification by enlarging the class to include all detained Haitians for whom a counsel's notice of appearance form had been entered (J.A. 184). The court earlier had modified the preliminary injunction to allow the government to proceed with exclusion hearings for those petitioners who were represented by counsel, but the modified injunction provided that no final order of exclusion against such a petitioner could be executed without prior notice to the district court (*id.* at 82-83 n.6).

The court reserved judgment on the First Amendment claims, suggesting that, depending on the kind of relief to be awarded in respect of petitioners' APA claim, the First Amendment claim might become moot (*id.* at 159 n.49). Although it recognized that a similar disposition of the equal protection claim was possible (*id.* at 159), the district court determined to reach the issues presented by that claim, in order to avoid a remand "for findings on issues already tried" in the event the court of appeals reversed its ruling on the APA issue (*ibid.*).

On the discrimination claim, the district court held that the government did not violate the equal protection component of the Fifth Amendment Due Process Clause (J.A. 159-169, 173). After careful consideration of the voluminous factual record (including live testimony during a six-week trial), the district court found that "[t]he policies and practices challenged herein, including detention, were proposed to and approved by the President of the United States in the context of developing a comprehensive new immigration policy," and that "[t]hese measures were intended to be applied to all aliens regardless of their race or national origin" (*id.* at 166-167). The court found that the revised parole policy was "designed to deal with another Mariel type situation, regardless of the nationality or number of the arriving aliens" (*id.* at 124). Although it had turned out, for a variety of reasons, that "Haitians [we]re impacted to a greater degree by the new detention policy than aliens of any other nationality at the * * * time" (*id.* at 165), the court found that the policy was "intended to be fair and that if another class of aliens arrived in this country in a situation similar to that of the [petitioners] they would be treated in a similar fashion" (*id.* at 169; footnote omitted).

The district court concluded that the statistical evidence adduced by petitioners to show that Haitians were disproportionately affected by the government's revised parole policy "does not deserve much weight in determining the merits of [petitioners'] discrimination claim"

(J.A. 128). The court observed that the statistical method employed by petitioners' expert was designed to test the probability that a particular result could have come about in a random manner, but that "[p]arole is not a random process and the probability of parole is not the same for every person" (*ibid.*). The statistician's analysis failed to take account of many relevant factors, such as the alien's age and health, the alien's reasons for seeking parole, the pendency of an asylum request by the alien, or the presence of a minor with the alien. Indeed, the only parole criterion that petitioners' statistician had adjusted for was the documentation status of the alien. *Ibid.* And even with respect to documentation, the expert's purported controls were "far too simplistic" because they did not distinguish between different types of documents possessed by aliens seeking admission or adjust for differences respecting the apparent validity or lack of regularity in any documentation presented (*ibid.*). In short, the court found that the evidence "simply did not establish the existence of a statistically significant relationship between being detained and being Haitian in the context of similarly situated individuals" (*ibid.*).

On the ultimate factual question of whether the challenged immigration policy was motivated by an invidiously discriminatory purpose in violation of the Due Process Clause, the district court found that petitioners failed to establish that respondents intended to discriminate against petitioners on the basis of race or national origin. Accordingly, the court rejected petitioners' Fifth Amendment claim. The court summarized its factual finding as follows (J.A. 173):

> [Petitioners] have failed to prove by a preponderance of the evidence that they were incarcerated because of their race and/or national origin. The evidence shows that the detention policy was not directed at [petitioners] because they were black and/or Haitian, but because they were excludable aliens unable to establish a prima facie claim for admission and that non-Haitians were detained pursuant to this policy as well. The mere fact that more Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminatory. Regardless of its ultimate impact, the policy was intended to be applied and was in fact applied equally to all similarly situated aliens regardless of their race and/or national origin.

Following a hearing on the relief to be ordered in connection with its APA ruling, the district court rendered its final judgment on June 29, 1982 (J.A. 175-185). In view of its holding that the government's revised parole policy was not promulgated in accordance with APA rulemaking procedures, the court declared that the new policy was "null and void" and that the prior policy was restored to "full force and effect" (*id.* at 178). Therefore, the court ordered that all class members in detention be released on parole under an interim plan, subject to certain terms and conditions (*id.* at 179-184). The court further held that, in light of the relief awarded, petitioners' First Amendment access claims had indeed become moot (*id.* at 175-176 n.2).

By order of June 30, 1982, the district court refused to stay the requirement that petitioners be released from detention. On July 2, however, the court granted a partial stay, authorizing future detention of excludable aliens refused parole in accordance with a properly promulgated regulation. On July 13, 1982, the court of appeals likewise denied the government's request to stay that portion of the district court's order requiring release of petitioners from detention (J.A. 191-192). As a result, the members of the class were paroled, but subsequent arrivals have been detained in accordance with the new parole regulations, which are codified at 8 C.F.R. 212.5 (J.A. 296).

4. Respondents appealed from the district court's ruling on the APA issue. Petitioners took a cross-appeal, pressing their due process and First Amendment claims, as well as two other claims that the district court had

dismissed on jurisdictional grounds in a preliminary ruling (see page 6, *supra*).[3]

A panel of the court of appeals ruled for petitioners on all issues save one (J.A. 193-291). The panel affirmed the district court's judgment with regard to the APA claim, although it adopted a different rationale for its ruling (*id.* at 219-237). On the other hand, the panel reversed the district court's judgment in favor of respondents on the Fifth Amendment discrimination claim, concluding that the district court's extensive findings of fact on this complex matter were clearly erroneous (*id.* at 238-276).

In connection with the due process claim, the panel observed preliminarily that, although petitioners "consistently have addressed this case as one premised both on nationality (Haitian) and race (black) [,] [t]he bulk of the evidence * * * was addressed to the nationality claim" (J.A. 243 n.29). Accordingly, the panel analyzed the claim in terms of nationality-based discrimination, and framed its instructions on remand in terms of "ensur-[ing] that all aliens, regardless of their nationality or origin, are accorded equal treatment" (*id.* at 291; footnote omitted).

The panel acknowledged that the government's new parole policy was publicly described by high-level officials as requiring "evenhanded treatment" (J.A. 212). But it concluded that the evidence offered by petitioners precluded any such characterization of the parole policy actually implemented by low-level INS officials in the field.[4]

[3] The additional claims presented the following questions: (1) whether individuals appearing for a preliminary inspection at the border are entitled to counsel and to be advised of any such right, and (2) whether INS must advise individuals of their right to apply for political asylum.

[4] In discussing the APA issue the panel acknowledged that "[t]he Administration announced a broad policy of detention" (J.A. 236 n.26) and stated that "the genesis of discriminatory enforcement may have been only a failure to clarify a general policy" (*id.* at 236), explaining (*id.* at 235):

> Those who formulated the policy failed to convey the policy to those responsible for implementing it. Left without guidance as to how to implement an undefined policy, the immigration inspectors enforced the detention policy as if it was intended to apply solely, and uniformly, to Haitians.

Notwithstanding the testimony of high-ranking "INS officials * * * that the [new parole] policy was intended to be applied 'across the boards,' but had its greatest impact on Haitians because no one else was 'similarly situated' " (*id.* at 258), the panel concluded that petitioners had offered evidence of "intentional government discrimination against Haitians" (*id.* at 259) and that the government had failed to overcome this showing (*id.* at 259-275).[5]

In light of its rulings, the court of appeals panel concluded that petitioners had impermissibly been denied parole (J.A. 291). It directed that the parole of petitioners ordered by the district court be continued, and remanded for entry of a remedial order that would ensure that the new parole policy "is effectuated in the future in a non-discriminatory manner" (*ibid.*).[6]

[5] The panel also held that the district court had erred in dismissing, on jurisdictional grounds, petitioners' claim concerning advice of their right to seek asylum before the INS district director (J.A. 276-285). On the other hand, the panel sustained the district court's "discretion in dismissing the [notification of right to] counsel claim as unexhausted" (*id.* at 284). Proceeding to the merits of the asylum notice claim, the panel held that the Fifth Amendment requires that excludable aliens such as petitioners be notified that they have a constitutionally protected right to seek asylum before the INS district director (*id.* at 286-287).

Finally, the panel concluded that the claim of the non-class petitioner, Haitian Refugee Center, Inc., that it has a First Amendment right of access to the detained class petitioners was not moot (J.A. 287-288). This claim was remanded to the district court for further proceedings (*id.* at 288-289).

[6] The panel observed that although the relief granted by the district court had been premised solely on a violation of the APA, the "terms of the relief ordered by the district court are not inconsistent with our holding here today and the court below should feel free to adhere to its original release program, supplementing

5. The court of appeals granted the government's petition for rehearing en banc (714 F.2d 96), thereby vacating the panel opinion (see 11th Cir. R. 26(k)). The en banc court dismissed in part, reversed in part, and remanded with instructions (J.A. 356-357).

All members of the en banc court of appeals agreed that the APA claim was moot because the government had, subsequent to the district court's decision, promulgated regulations in accordance with the APA, and because the only persons remaining in detention in the wake of the district court's order granting parole "either had their parole revoked for failure to comply with the terms of the district court's order * * * or arrived in this country after the government's promulgation of its new regulations" (J.A. 296). The en banc court accordingly directed that the government's appeal be dismissed and that the remedial provisions of the district court's judgment based upon its APA ruling be vacated (*ibid.*).

With respect to the due process claim, an eight-member majority of the court of appeals held that petitioners, as excludable aliens, were not entitled to invoke the Fifth Amendment to attack the Attorney General's refusal to grant them parole (J.A. 296-323, 341-343). Because "the decision to parole or detain an excludable alien is an integral part of the admissions process" (*id.* at 298; see also *id.* at 310-317), the court of appeals concluded that petitioners' claim was barred by the well-settled rule that "[a]liens seeking admission to the United States * * * have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress" (*id.* at 309). (The four other members of the court of appeals deemed it unnecessary to reach this issue. See page 15, note 8, *infra*).

Although the court of appeals thus held that the government's parole policy was not subject to a constitutional

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it as necessary to ensure there is no repetition of the equal protection violation" (J.A. 291 n.63).

due process attack, the court indicated (J.A. 323-331) that the implementation of this policy was not "immune from judicial review" to correct arbitrary exercise or withholding of discretionary action (*id.* at 323). The court of appeals held that judicial review was available to assure that there was a " 'facially legitimate and bona fide reason' " for the action taken in the case of a particular alien (*id.* at 326 (emphasis omitted), quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972); J.A. 330) and to determine "whether the actions of lower-level officials in the field conform to the policy statements of their superiors in Washington" (*ibid.*). Because the court of appeals accepted the government's contention that, as the district court had found, the new restrictive parole policy was not designed to discriminate on the basis of national origin (*id.* at 298-299, 328-330), judicial review in this case could redress any unauthorized discrimination in the implementation of that policy (*id.* at 330-331):

> If the [district] court should find that low-level immigration officials have discriminated on the basis of national origin despite the adoption of a contrary policy by their superiors in the executive branch, such conduct would constitute an abuse of discretion that would justify appropriate relief.[7]

See also J.A. 299.

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[7] The parties had disputed whether Executive Branch officials share with Congress the authority to draw nationality-based distinctions among aliens seeking to enter the United States. See J.A. 328-329. Because the court of appeals determined that "responsible executive officials" had not sought to exercise such authority here and had instead established a non-discriminatory parole policy, it concluded that "resolution of this question is not essential to our holding" (*id.* at 328-329). Nevertheless, the court of appeals stated that "there is little question that the Executive has the power to draw distinctions among aliens on the basis of nationality" and that this executive authority is vested in "responsible executive officials such as the President or Attorney General" under the Immigration and Nationality Act (J.A. 329 & n.30).

The court of appeals remanded the case so that this nonconstitutional standard of review could be applied to the cases of those "class members presently in detention" (J.A. 330; see also *id.* at 342). The court of appeals directed that (*id.* at 330):

> [t]he district court on remand should conduct such proceedings as are necessary to determine whether there exists a facially legitimate and bona fide reason for [denying parole], remembering that it is not the court's proper role "to disregard the [stated criteria employed] or to substitute its own policy preferences for those of the official vested by law with discretionary authority to act on requests for parole" [*Bertrand* v. *Sava*, 684 F.2d 204,] 217 [(2d Cir. 1982)]. The district court should consider (1) whether local immigration officials in fact exercised their discretion under [8 U.S.C.] § 1182(d)(5)(A) to make individualized determinations and (2) whether the criteria employed in making those determinations were consistent with the statutory grant of discretion by Congress, the regulations promulgated by the agencies involved, and the policies which had been established by the President and the Attorney General.

The court of appeals thus concluded (J.A. 342-343) that, although "[e]xcludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution," they "do have rights * * * to whatever process Congress—and through its regulations and established policies, the Executive branch—have extended them," and accordingly "do[] not stand altogether outside the protection of our laws." [8]

[8] The en banc court also addressed the asylum/notice and First Amendment access issues. The court of appeals held that the district court had jurisdiction to consider whether petitioners have a constitutional right to be advised of their statutory right to seek asylum, but, on reaching the merits, held that there is no constitutional right to such notice (J.A. 331-340). The court of appeals also held that the Haitian Refugee Center's First Amendment access claim was not moot, but could not be properly evaluated on the existing record (*id.* at 340-341). This claim was remanded to the district court (*id.* at 341).

Judge Tjoflat, who joined the majority opinion in all other respects, dissented with regard to the scope of nonconstitutional review available on remand, criticizing that remand as unduly broad and needlessly intrusive upon intra-Executive Branch communications (J.A. 343-346). He suggested that the court of appeals had unrealistically posited a dichotomy between general INS policy set at the national level and implementation of that policy in the field (*id.* at 344-345). Instead, Judge Tjoflat reasoned, the courts should "assume the Attorney General to adopt the actions of his officers in the field and ask him to justify them" under a narrow abuse of discretion standard (*id.* at 344, 345-346).

Judge Kravitch, joined by three other members of the court, concluded in a separate opinion that, in light of the scope of nonconstitutional review available on remand, "the district court and the panel erroneously reached the constitutional questions," that those questions were not properly before the court of appeals, and that the majority's discussion of them "can only be viewed as dicta" (J.A. 347, 348). Although these judges apparently agreed with the majority that the authority of the Executive to draw distinctions among aliens based on nationality was not before the court (*id.* at 347-348 & n.2), they argued that distinctions drawn by high-level officials must be rational in order to pass muster under an abuse of discretion standard (*id.* at 348-351). Finally, the judges joining in the separate opinion dissented from the majority's ruling on the asylum/notice issue (*id.* at 353-354).

B. Current Posture of this Case

Before discussing the questions presented by the petition, we believe that it would be useful to clarify the current posture of this case. We do so because our further study of the decisions below and the arguments of petitioners as they now emerge in this Court persuade us that the questions presented bear a rather remote relationship to petitioners' interests.

We do not suggest that the case is moot. Nor do we urge that the writ of certiorari should be dismissed as improvidently granted. There has been no significant change in the dimensions of the case since the Court

granted certiorari; the Court has discretion to decide the question presented, and its resolution is important to the administration of our immigration laws. Nevertheless, the Court should be fully aware of the following considerations.

It is fundamental that this Court reviews judgments rather than statements in the opinions that underlie them. *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723 n.7 (1982). It is therefore appropriate to ask whether resolution of the questions presented by petitioners is likely to have a substantial effect on the court of appeals' judgment. We think this doubtful for two reasons. First, the members of the class generally have already received the relief (release on parole) to which they claim they were entitled. Second, as to any class members now in detention, the court of appeals' remand provides an opportunity for redress on nonconstitutional grounds if it can be shown that their detention is attributable to unauthorized discrimination.

1. As we have explained (pages 6, 9, *supra*), based on its Administrative Procedure Act ruling the district court's final judgment required the release of all class members in detention on the date of the judgment, and barred future detention of new arrivals until the new parole policy was embodied in a rule published under the APA. The INS has now promulgated the regulation required by the district court's judgment. See 8 C.F.R. 212.5. Thus, any current detention of excludable Haitians either is being carried out pursuant to the new regulation or results from the detainees' violation of the terms of the district court's release plan. See page 12, *supra*. There accordingly is no reason to determine whether a showing of discrimination in the *original* detention of class members would have entitled them to the remedy of release on parole.[9]

[9] We note that the district court reached the due process issue only because of its concern that judicial economy would be ill served in the event that its APA ruling were reversed (J.A. 159 & n.49; see page 7, *supra*). Significantly, the court of appeals panel left open the question whether its finding of discrimination required any change in the district court's judgment. See page 11 note 6, *supra*.

Of course, some members of the class apparently are now in detention, and others who are presently paroled may in the future again be detained. But any discrimination claims that might arise from such detention would be quite different from the claims made here.[10]

[10] Challenges to detention may in the future be raised by three classes of persons: (1) those class members who have been redetained following the district court's release order because of a violation of its terms; (2) those Haitians who have recently been detained on arrival pursuant to the uniform regulation governing parole promulgated in response to the district court's APA ruling; and (3) those class members whose parole may be revoked at such time as the district court acts upon the court of appeals' direction to vacate its APA-based injunction (see page 12, *supra*). None of these groups could present a claim similar to that presented here by petitioners.

Even if a claim of discriminatory detention were to be advanced by any such persons, it would not arise out of the events and evidence reviewed by the district court pertaining to the government's initial implementation of its new parole policy—the basis for the claims before this Court. Moreover, the first group of detainees plainly could raise no colorable equal protection objection. The district court's order expressly authorized revocation of parole for those who "inexcusabl[y]" fail to meet the terms of their parole or who are deemed a security risk or likely to abscond (J.A. 179, 183, 184 & n.6).

As to the second and third groups of detainees, any detention would arise from the routine and practiced application of the published regulation that establishes uniform guidelines regarding detention pending exclusion proceedings. Significantly, despite their disagreement on other key matters, each of the opinions below strongly suggests that any problem of unequal application of the new parole policy that may have accompanied its initial introduction was purely transitional and temporary in nature (J.A. 170, 235-236 & nn.24 & 26, 330; see pages 10-11 note 4, *supra*). We note, as well, that the district court has recently determined that Haitians detained under 8 C.F.R. 212.5 are outside of the certified class. See Order on Mandate, No. 81-1260-CIV-EPS (S.D. Fla. June 8, 1984), at 1 n.1. And as to the final group of persons that

2. The court of appeals' ruling already affords petitioners an opportunity to seek relief from any unauthorized discrimination on nonconstitutional grounds that are not before the Court. In such circumstances, the Court's usual practice is to decline to decide constitutional questions unnecessarily. See *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 & n.22 (1979); *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

The en banc court of appeals held that a denial of parole is reviewable—wholly apart from the provisions of the Fifth Amendment—for abuse of discretion, and indicated that such an abuse could be made out in the present case by demonstrating a discriminatory denial of parole in contravention of the nondiscriminatory uniform national policy. See pages 12-14, *supra*. To the extent that any member of the class remains in detention, he thus retains the opportunity to seek relief upon showing that his detention is attributable to unauthorized discrimination by low-level INS enforcement officials. Because of the availability of this statutory remedy, it may not be necessary to decide here whether the Constitution grants petitioners an additional avenue for relief. See *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979); *Bertrand* v. *Sava*, 684 F.2d 204, 207 n.6 (2d Cir. 1982). Indeed, the members of the panel (who had initially concluded that the Fifth Amendment does allow a challenge to discriminatory exercise of parole authority (J.A. 238-241)) ultimately concluded that there was no reason for the court of appeals to reach the constitutional issue here, that the district court and the panel had done so erroneously, and that the en banc court's discussion of the issue was dicta (see page 15 n.8).

Moreover, this view of the case is reinforced by petitioners' acceptance of the court of appeals' conclusion that

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may be subject to detention, such detention would not follow automatically from the lifting of the district court's injunction. Rather, the Attorney General would first have to exercise his statutory authority to determine whether, and in what circumstances, particular paroled aliens should be restored to detention.

the new parole and detention policy established by responsible Executive Branch officials was nondiscriminatory (Pet. Br. 7-10, 30, 37, 38). Petitioners have altered their claim in this regard. The gravamen of that claim is now that INS field officials enforced a facially neutral detention policy in an unauthorizedly discriminatory fashion against Haitians (see, *e.g.*, *id.* at i, 3, 10, 16, 21-22, 30, 42).[11] As petitioners' argument now emerges (*id.* at 37; emphasis added):

> This case does not implicate the authority of Congress, the President, or the Attorney General. Rather, it challenges the power of low-level politically unresponsive government officials to act in a manner which is contrary to federal statutes, treaty, and *the directions of the President and the Attorney General, both of whom provided for a policy of nondiscriminatory enforcement.*

See also Br. 36-39. Given this reformulation of petitioners' claim, the court of appeals' statutory analysis offers them a complete remedy.

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[11] Petitioners had heretofore claimed at least in part that responsible high-level INS officials had themselves designed a discriminatory parole policy. Both the Attorney General and the INS Commissioner were named as defendants (J.A. 30) and the complaint makes no mention of the theory that low-level officials were responsible for any discrimination. Instead, the complaint charges without differentiation that "Defendants have followed a 'Haitian Program,' treating Haitian refugees differently than other refugee groups" (J.A. 38). See also Pretrial Stipulation at J.A. 106; 5/14/82 Tr. 84, 133-137, 153-157, 171-172; 5/18/82 Tr. 143; Pet. C.A. Opening Br. 6-10 (panel). The opinion of the district court confirms that petitioners did not then draw the distinction upon which they now rely. See, *e.g.*, J.A. 160-169, 173.

The new focus of petitioners' argument appears to be a response to the vacated opinion of the court of appeals panel and the decision of the en banc court. See pages 10-11 n.4, 12-14, *supra*. The panel's opinion makes clear that petitioners there sought to prove discriminatory intent on the part of high-level INS officials (see J.A. 251-254, 257-259). The en banc court of appeals' discussion of the authority of responsible Executive officials to draw nationality-based distinctions also reflects petitioners' continuing pursuit of their claim of high-level discrimination (see *id.* at 328-329 & n.30).

3. Petitioners' discussion of the relief they seek confirms the peculiar posture of this case. They complain, somewhat disingenuously, that the court of appeals' remand "is directed only to those 'class members presently in detention' " and "provides no relief for[] the approximately 1700 class members who have been released from detention" (Br. 21 n.27, quoting J.A. 330). Petitioners acknowledge, however, that the only additional relief they could seek in the event of a reversal by this Court would be "injunctive relief to prevent the recurrence of the pattern of discrimination to which Haitians have been subjected" (Br. 21 n.27). Petitioners thus seem to recognize that the question presented is of only academic interest except insofar as it might support entry of an injunction against future low-level discrimination.[12]

SUMMARY OF ARGUMENT

The question presented in this case goes to the very heart of the sovereign power of the United States to determine whether particular aliens shall be eligible to enter our Nation and join our society. Acting pursuant to statutory authority, the President, the Attorney General and other responsible Executive Branch officials have in recent years carefully formulated immigration policies

[12] Petitioners have not explained the nature or scope of the injunction they seek. In light of the broad authority of the Attorney General to implement nationality classifications in enforcing the immigration laws (see pages 48-59, *infra*), the unlikelihood of the repetition of circumstances that underlie any colorable claim of discriminatory enforcement (see pages 17-18 n.10, *supra*), and doctrines that limit the granting of injunctive relief, we very much doubt that any such relief would be available. See, *e.g.*, *Los Angeles* v. *Lyons*, 461 U.S. 95 (1983); *Rizzo* v. *Goode*, 423 U.S. 362, 376-377 (1976); see also *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). In any event, to the extent that injunctive relief may not be foreclosed, petitioners have not explained why the availability of a nonconstitutional right of review recognized by the court of appeals would not provide an adequate basis for an equitable remedy.

deemed necessary to regain control of our borders. A key part of this effort is the restrictive parole policy challenged here, which is designed to discourage future waves of illegal immigration by greatly restricting the opportunity for excludable aliens to be paroled pending a determination of admissibility. There is no warrant for reading the Constitution to authorize the courts to override this policy determination made by the political branches of government and to afford the remedy of parole into the United States to a class of aliens stopped at our borders whose admissibility has never been demonstrated.

A. For nearly a century, this Court has recognized the plenary authority of the Legislative and Executive Branches over matters pertaining to the admission or exclusion of aliens. See the *Chinese Exclusion Case*, 130 U.S. 581 (1889); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892). This sovereign authority is at its zenith with respect to excludable aliens—those who stand "on the threshold of initial entry" (*Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953))—as distinguished from deportable aliens, who have already gained entry within our borders in some fashion. See *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958).

Petitioners concededly fall within the former category; they are excludable aliens. Accordingly, as this Court has long held and repeatedly reaffirmed, they have "no constitutional rights regarding [their] application[s]" for admission to this country (*Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982)). This settled constitutional rule does not mean that petitioners are not "persons" within the meaning of the Fifth Amendment; nor does it suggest that they have no rights to due process or other constitutional protections. Rather, the rule means only that, when petitioners challenge the authorized determinations of the Attorney General respecting their applications for admission to this country—or their demand for de facto admission by parole—invocation of the Fifth Amendment

does not enlarge their rights: "Whatever the procedure authorized by Congress is, it is due process as far as an [excludable] alien denied entry is concerned." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950).

B.1. Congress has commanded the Attorney General to detain "for further inquiry" every alien not "clearly and beyond a doubt entitled to land" (8 U.S.C. 1225(b)), but has conferred upon him some discretion to parole unadmitted aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest" (8 U.S.C. 1182(d)(5)(A)). In order to deal more effectively with a threatened breakdown of governmental control over our borders and stem the tide of illegal immigration, the Attorney General determined in 1981 that it was necessary to institute a restrictive parole policy under which excludable aliens unable to demonstrate a right of admission were generally to be detained as authorized by statute, rather than granted discretionary parole.

Petitioners' attempt to raise a due process challenge to this exercise of the Attorney General's parole and detention authority is foreclosed by the long-settled principles set forth above. When unadmitted aliens seek temporary admission via parole pending the outcome of their exclusion proceedings, the Attorney General's exercise of discretion is part and parcel of the exclusion process itself. As this Court has observed, "detention, or temporary confinement" is "part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens * * *." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896); see also *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952). *Mezei*, too, confirms that parole decisions are an integral part of the exclusion process.

Indeed, any distinction between parole and admission would be wholly incompatible with the bases for the entry doctrine established by this Court's decisions. Release on parole means de facto admission into this country. Although such temporary admission does not alter the

alien's legal status as "excludable" (8 U.S.C. 1182(d)(5)(A)), as a practical matter it enables him to remain physically at large within our borders until final disposition of his application for admission. A paroled alien may abscond, obtain employment (lawfully or unlawfully) that would otherwise go to an American citizen, or cause other harms that our immigration laws are designed to prevent. Moreover, as this case illustrates, parole often amounts to admission for an extended period of years. Accordingly, recognition of the right to judicially-mandated parole sought by petitioners cannot be reconciled with the plenary authority of the political branches to govern the admission of aliens into the United States.

2. Petitioners argue that because they claim to have suffered unlawful discrimination among excludable aliens, the entry doctrine is inapplicable here. But the obstacle to judicial review of the denial of parole arises from the nature of the remedy sought, not the nature of the right invoked or the violation claimed. The courts simply lack authority to authorize entry into the United States by an unadmitted alien when the political branches have denied that benefit.

C.1. The unavailability of extrastatutory judicial review of denial of parole also follows from the broad auth rity of the political branches to apply nationality distinctions in framing and implementing the immigration laws. This Court has recognized that in the immigration context the government "regularly makes rules that would be unacceptable if applied to citizens," among them rules governing exclusion of aliens, and that even when resident aliens are affected, such rules and classifications are not subject to the standards used to judge claims of discrimination under the Fourteenth Amendment. *Mathews* v. *Diaz*, 426 U.S. 67, 80, 87 (1976). The political branches have authority to adopt a "wide variety of classifications * * * in the light of changing political and economic circumstances"; such classification decisions are

"frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary" (*id.* at 81). Thus, even when the rights of admitted aliens are at issue, such classifications may be set aside only when "wholly irrational" (*id.* at 83) or lacking facial legitimacy (*Fiallo* v. *Bell*, 430 U.S. 787, 798 (1977)).

Because of the inherent subject matter of immigration law—the relationship of the United States with nationals of various foreign countries—nationality classifications have been commonplace in this context. The courts have consistently recognized the validity of such classifications, which frequently represent policy initiatives integral to the conduct of our foreign relations. On occasion, nationality classifications have been adopted "in order to make a humane response to a natural catastrophe or an international political situation" (*Diaz*, 426 U.S. at 81); but they are equally necessary when the actions of a foreign government or its people require the political branches to *restrict* the opportunity for entry. See the *Chinese Exclusion Case*, 130 U.S. at 606. Because the Nation's policies regarding admission of aliens are inextricably bound up with control over foreign affairs, any rule inhibiting the ability of the Executive and Legislative Branches to draw nationality classifications in this field would diminish the United States' sovereign authority to protect itself against threats to our interests in the world arena.

In the special context of claims of unadmitted aliens, considerations of sound policy and separation of powers dictate that court-ordered parole be foreclosed when inconsistent with the determinations of the political branches. The courts lack the expertise and information sources that would be necessary to appraise the basis for nationality classifications established with regard to the entry of aliens. Nor do they possess standards by which to assess the justifications for such distinctions. Accordingly, any effort to undertake such judicial review would be an empty formality that would serve only to burden and intrude upon sensitive operations of the Executive.

2. Assuming that petitioners were able to show that nationality classifications adversely affected their chances for parole, the circumstances that existed at the time petitioners attempted unlawfully to enter the United States provided ample justification for such a policy. As petitioners now concede, the restrictive parole policy instituted in 1981 was intended to be applied evenhandedly to aliens seeking admission. Even the court of appeals panel recognized (J.A. 198), however, that the Nation's immigration crisis had, because of the influx of excludable Haitian and Cuban aliens, assumed special dimensions in South Florida by mid-1981. That influx, which caused massive disruptions to the State of Florida and the communities affected, was a major factor in the adoption of the new parole policy. In these circumstances, and given the Attorney General's determination that liberal parole merely encouraged further illegal entries, it would have been entirely permissible to implement the new parole policy vigorously and promptly with respect to petitioners.

ARGUMENT

THE FIFTH AMENDMENT PROVIDES NO BASIS FOR OVERRULING THE ATTORNEY GENERAL'S DECISION TO DENY PAROLE TO AN EXCLUDABLE ALIEN PENDING DETERMINATION OF THE ALIEN'S ADMISSIBILITY TO THE UNITED STATES

A. The Due Process Clause Does Not Augment the Statutory Rights of Excludable Aliens Regarding Determinations Related to Their Admission to the United States

1. From its very first examination of the federal government's exclusion power nearly a century ago, this Court has consistently recognized the plenary authority of the Legislative and Executive Branches to establish and implement, free from judicial intervention, the substantive criteria and procedures for determining whether an alien should be admitted to the United States or

whether he should instead be denied the right to enter and thus be excluded. See the *Chinese Exclusion Case*, 130 U.S. 581, 603-604, 606, 609 (1889); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892). The untrammeled authority to govern admission of aliens is a fundamental and inherent attribute of sovereignty. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). See also 8 M. Whiteman, *Digest of International Law* §§ 15-16 (1967); 3 G. Hackworth, *Digest of International Law* § 294 (1942). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens (*Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). And this pervasive authority extends to both the Legislative and Executive Branches in the fulfillment of their respective functions.

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

Lem Moon Sing v. *United States*, 158 U.S. 538, 547 (1895).

Although "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law" (*Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)), aliens who have not been admitted to this country are governed by a different constitutional rule. "[A]n alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Ibid.* (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. at 544). An alien's right "to enter the United States depends on the congressional will,

and courts cannot substitute their judgment for the legislative mandate." *Mezei*, 345 U.S. at 216. See also *Nishimura Ekiu* v. *United States*, 142 U.S. at 660 (emphasis added):

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. *As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.*

The critical distinction between aliens who have gained entry to the United States and those who have not is ingrained in our law. The absence of extrastatutory protection for unadmitted aliens seeking initial admission has consistently been recognized. The Court observed in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958):

> [O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."

Similarly, the Court indicated in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 600 (1953) (emphasis added), that an immigration regulation denying a hearing on an order of permanent exclusion "raises no constitutional conflict if limited to 'excludable' aliens who are not within the protection of the Fifth Amendment."

In *Kleindeinst* v. *Mandel*, 408 U.S. 753, 762 (1972), the Court reiterated that "an unadmitted and nonresi-

dent alien [has] no constitutional right of entry to this country as a nonimmigrant or otherwise," explaining that this doctrine is rooted in the core notion of national sovereignty (*id.* at 765, quoting Gov't Br. at 20; emphasis added):

> In accord with the ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), and in *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893), held broadly * * * that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a *power to be exercised exclusively by the political branches of government* . . . ."

Finally, the Court has only recently recapitulated and reaffirmed this "entry doctrine" established by earlier cases: "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982).

It is undisputed that the Haitian petitioners in this case have not been admitted into the United States and fall within the category of "excludable" aliens (J.A. 160, 310).[13] Accordingly, under the settled principles discussed above, they are " 'excludable' aliens who are not within the protection of the Fifth Amendment." *Kwong*

[13] The physical presence of class members within the boundaries of the United States does not alter their status in this regard. The Court has long recognized that an unadmitted excludable alien's legal status is not affected by his physical presence within the territorial boundaries of the United States; "he is treated as if stopped at the border" (*Mezei*, 345 U.S. at 215). See also *Leng May Ma* v. *Barber*, 357 U.S .at 188; *Nishimura Ekiu* v. *United States*, 142 U.S. at 661; 8 U.S.C. 1182(d)(5)(A) (grant of parole "shall not be regarded as an admission of the alien"); 8 U.S.C. 1223(a) (removal of alien from vessel or aircraft for examination by immigration official "shall not be considered a landing").

Hai Chew v. *Colding*, 344 U.S. at 600. They thus have "no constitutional rights regarding [their] application[s]" for admission. *Landon* v. *Plasencia*, 459 U.S. at 32.

2. This Court's decisions establish beyond question that the Due Process Clause does not augment the rights available to excludable aliens under congressionally sanctioned procedures regarding the determination of admissibility or denial of entry. At the outset of their argument, however, petitioners attempt to sidestep the thrust of these governing precedents by stating the question presented in inflammatory terms and misrepresenting the holding of the court of appeals. Contrary to petitioners' submission (Br. 25-29), the question presented here assuredly is not whether "excludable aliens are 'persons' protected by the Fifth Amendment" (*id.* at 25). Nor was the court of appeals confused on this score, as petitioners charge (*id.* at 27).

The court of appeals correctly recognized that the question whether excludable aliens are "persons" within the meaning of the Fifth Amendment simply is not at issue. The court below acknowledged that "there are certain circumstances under which even excludable aliens are accorded rights under the Constitution" (J.A. 317), citing as examples constitutional protections granted criminal defendants and the right to compensation for governmental taking of property located within the United States (*id.* at 318-319). The court of appeals explained that excludable aliens can raise such "constitutional challenges to deprivations of liberty or property" because they arise "outside the context of entry or admission, when the plenary authority of the political branches is not implicated" (*id.* at 317-318; see also *id.* at 319-320). There is no reason to consider in this case the extent of constitutional protection available to excludable aliens in contexts removed from immigration proceedings that govern or affect their entry into the United States. As the court of appeals understood, this case must be decided on far narrower and more specific grounds: whether the

requirements of due process under the Fifth Amendment enlarge excludable aliens' procedural and substantive rights in the exclusion process, beyond those provided by statute, administrative rule and practice.

Viewed in this correct focus, the precisely stated holding of *Mezei* cannot be averted here (345 U.S. at 212, quoting 338 U.S. at 544): "'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" As the Court's language clearly indicates, *Mezei* does not suggest that excludable aliens are not persons in contemplation of law. Rather, it is carefully directed at the constitutional rights of such persons regarding their exclusion and related detention. Indeed, even in the exclusion context *Mezei* does not in arbitrary fashion simply bar assertion of constitutional rights by excludable aliens. Instead, the Court concluded that, because of the plenary authority of the political branches to establish terms and conditions under which aliens may be received into our Nation's midst, the requirements of due process simply have no content in this context apart from the rights granted by Congress. See *Landon* v. *Plasencia*, 459 U.S. at 32. Accordingly, petitioners' vigorous efforts to establish that excludable aliens are "persons" within the Fifth Amendment are directed at a straw man. Plainly it is petitioners and not the court of appeals who have "confused the fact that all 'persons' such as the Haitian petitioners are covered by the fifth amendment, with the extent of the reach of their constitutional protection in differing contexts" (Br. 27).[14]

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[14] Petitioners' claim (Br. 28-29) that the cases we rely on do not establish that they are not persons within the meaning of the Fifth Amendment is thus simply beside the point. Conversely, the cases on which petitioners rely to establish the legal status of excludable aliens as persons within the contemplation of law (Br. 25-27) are inapposite. None of these cases addresses the right of excludable aliens to challenge on Fifth Amendment

3. In another effort to parry the thrust of the entry doctrine cases, petitioners assert that "even congressional and presidential decisions concerning the admission of

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grounds the decisions of the Legislative and Executive Branches respecting their admission to the United States.

For instance, *Plyler* v. *Doe*, 457 U.S. 202 (1982), addresses the rights of persons who have entered the United States—albeit illegally—with regard to discriminatory action by states, which do not have constitutional responsibility for immigration matters. The very passage cited by petitioners (Br. 25) is carefully addressed to persons "presen[t] in this country" and rests directly upon the distinction recognized in *Mezei* between unadmitted aliens and those who are present, even illegally, in the United States. *Plyler*, 457 U.S. at 210. Petitioners' reliance on *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976), a case addressed to rights of resident aliens in a context wholly unrelated to administration of the immigration laws, is misplaced for the same reason. As the court of appeals noted (J.A. 318-320 & n.22), *Wong Wing* v. *United States*, 163 U.S. 228 (1896), likewise addresses the rights of a resident alien regarding criminal prosecution. That case explicitly distinguishes between the exclusion and criminal prosecution contexts in holding constitutional protection available to aliens in the latter situation. 163 U.S. at 237. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), again addresses the rights of resident aliens, and is unrelated to enforcement of the immigration laws.

Russian Volunteer Fleet v. *United States*, 282 U.S. 481 (1931), addresses only the obligation of the United States to pay just compensation to an alien corporation when the government takes property located within the United States; in any event, the Court ultimately concluded in that case that there was statutory authorization for payment of just compensation. See *id.* at 489-492. *Reid* v. *Covert*, 354 U.S. 1 (1957), addresses only the rights of United States citizens. Finally *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922), considers only whether the Sixth Amendment right to jury trial applies in Puerto Rico. Applying the doctrine of the *Insular Cases* (*Downes* v. *Bidwell*, 182 U.S. 244 (1901), *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903), and *Dorr* v. *United States*, 195 U.S. 138 (1904)), the Court determined that Puerto Rico did not have the status of an incorporated territory and that the Sixth Amendment jury trial guarantee accordingly was unavailable to a criminal defendant. Petitioners quote out of context (Br. 26) the Court's statement that the "Constitution of the United States is in force * * * wherever and whenever the sovereign power of that government is exerted" (258 U.S. at 312). They ignore, however, the

aliens are subject to constitutional scrutiny" (Pet. Br. 36). Again petitioners serve up a smorgasboard of authorities directed at other issues while adducing none that is pertinent here. See also pages 30-32 note 14, *supra*.

Petitioners' reliance on the *Chinese Exclusion Case* is misplaced. Although the Court there indicated that the "sovereign power[]" to "admit subjects of other nations to citizenship" is subject to any restraint imposed by "the Constitution itself" (130 U.S. at 604), it concluded that the Constitution imposes *no* restraint upon the authority of Congress to exclude a class of aliens based on their national origin, and that the determination of the Legislative Branch as to the "necessity" of any such classification is "conclusive upon the judiciary" (*id.* at 606). Petitioners' citation of *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101-103 (1976), is likewise unavailing. Although the Court referred in passing to the availability of "narrow judicial review" with respect to the exercise of "the power over aliens" (*id.* at 101-102 n.21), the case was addressed only to the rights of resident aliens with regard to administratively imposed citizenship requirements for federal employment. In this context, wholly unrelated to admission or immigration, the Court merely held that "federal power over aliens" is not "so plenary

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holding of *Balzac*, which undermines their position. They also neglect the Court's reconciliation of its holding with its acknowledgment that the Constitution "applies" in Puerto Rico (*ibid.*):

> The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power * * *.

The entry doctrine is completely consistent with this view of the Constitution. In the end, petitioners are unable to cite any decision of any court that recognizes rights such as they claim in a situation comparable to this case. See Resp. Br. in Opp. 20-21; compare Pet. Br. 26 n.31.

that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens" (*id.* at 101).[15]

Petitioners also rely on the following language in *Fiallo* v. *Bell*, 430 U.S. 787, 793 n.5 (1977): "Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens * * *." This statement is unaccompanied by any citation of supporting precedent. In any event, read in context *Fiallo* suggests only that classifications respecting aliens are subject to judicial review—albeit of a highly deferential nature—when those classifications directly affect the rights of citizens or resident aliens who are proper parties to the litigation.

Fiallo involved a Fifth Amendment equal protection challenge to provisions of the immigration laws that extended special preference immigration status to an illegitimate child of a female United States citizen or lawful permanent alien, but denied a similar preference to an illegitimate child of a citizen or resident father. Applying the exceedingly deferential standard of review announced in *Kleindeinst* v. *Mandel*, *supra*, the Court concluded that the legislative classification should be sustained because it was based on a "'facially legitimate and bona fide'" policy decision by Congress, as to which the courts possess "no * * * authority to substitute [their own] political judgment" (430 U.S. at 794, quoting 408 U.S. at 770; 430 U.S. at 798). The Court remarked that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative deci-

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[15] *Korematsu* v. *United States*, 323 U.S. 214 (1944), and the other cases cited by petitioners (Br. 36) are inapposite here as well, for they address only the rights of United States citizens and have no bearing on the special question of the extrastatutory rights of excludable aliens in the admission and parole contexts. In any event, as we have explained (pages 29-30), the entry doctrine does not rest on any view that excludable aliens are not persons, or that the Constitution simply does not apply to such persons.

sion" (*id.* at 799 (footnote omitted)), and it refused to reweigh competing policy considerations or assess the comparative merit of alternative policies, stating that the "decision not to accord preferential status to this particular class of aliens * * * remains one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control'" (430 U.S. at 799, quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

To be sure, in *Fiallo* the Court turned aside the government's threshold suggestion that the challenged statutory provisions were wholly exempt from judicial scrutiny. 430 U.S. at 793 n.5. But *Fiallo* itself presented a claim of discrimination allegedly "infring[ing] upon the due process rights of citizens as legal permanent residents" and "implicat[ing] 'the fundamental constitutional interests of United States citizens and permanent residents'" (*id.* at 794, quoting Appellant's Br. at 53-54; see also 430 U.S. at 798). Indeed, the plaintiffs in *Fiallo* included citizens or resident aliens who sought to invoke a preference status on behalf of their children or parents, notwithstanding the illegitimate status of the relationship involved. 430 U.S. at 790. Thus the case did not involve only the rights of unadmitted aliens.

Accordingly, in *Fiallo* the Court simply had "no occasion to consider * * * whether there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable" (430 U.S. at 793 n.5).[16] Nothing in *Fiallo*—which emphatically refused to depart from past precedents governing the proper relationship of the courts to the political branches of government respecting admission-related determinations and classifications (see *id.* at 792-793 n.4)—indicates that the Court has abandoned or qualified the entry doctrine. Because the claim presented in this case entails only the alleged violation of the due process rights of excludable aliens, *Fiallo* provides no support for petitioners' contentions.

[16] This view of the case is corroborated by the Court's reliance (430 U.S. at 794-795) on *Kleindeinst* v. *Mandel*. The *Fiallo* plaintiffs had argued that because the rights of United States citizens or residents were implicated, the Court should apply a less deferential standard of review than that employed in *Mandel*. The Court responded that *Mandel* also had concerned an alleged infringement of citizens' rights (under the First Amendment). 430 U.S. at 794. Of course *Mandel* itself makes clear that excludable aliens "personally" enjoy no constitutional rights respecting entry to the United States (408 U.S. at 762). It was only because the Court concluded that the citizen-plaintiffs there had asserted a non-frivolous claim that their own First Amendment rights were infringed by the alien plaintiff's exclusion (*id.* at 762-765) that the Court proceeded to consider whether "a facially legitimate and bona fide" (*id.* at 769, 770) justification had been adduced for the alien's exclusion (compare *id.* at 762 with *id.* at 765-770). Indeed, even in this context, the Court reserved rather than rejected the government's contention that the justification for excluding the alien was wholly beyond judicial review. *Id.* at 769, 770.

Thus the *Fiallo* Court's detailed and explicit reliance on *Mandel*, coupled with its unexplained reference to prior cases said to establish the availability of limited judicial review in the admission context, strongly suggests that the narrow right of judicial review recognized does not extend beyond cases where the constitutional rights of United States citizens or residents are implicated.

B. The Entry Doctrine Bars Petitioners' Challenge to the Denial of Parole Pending Exclusion Proceedings

1. Petitioners contend (Br. 31-35) that the principles of the entry doctrine do not, in any event, govern this case because they invoke the Fifth Amendment not with respect to their applications for admission but, instead, with respect to their applications for parole from detention pending a determination of admissibility. The court of appeals correctly rejected this contention (J.A. 311-317).

a. The statutory command to detain "for further inquiry" every alien not "clearly and beyond a doubt entitled to land" (8 U.S.C. 1225(b)), which implements the Nation's plenary authority to exclude aliens, and the statutory grant to the Attorney General of discretionary au-

thority to parole unadmitted aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest" (8 U.S.C. 1182(d)(5)(A)), are inextricably interrelated both in legal and practical terms. The availability of parole in appropriate cases "is simply a device through which needless confinement is avoided while administrative proceedings are conducted." *Leng May Ma* v. *Barber*, 357 U.S. at 190. Where appropriate, parole thus serves, in practical effect, to moderate the rigor of the rule that freely permits detention of unadmitted aliens pending exclusion proceedings. The discretionary authority to grant or withhold parole is, moreover, inextricably bound up with the inherent sovereign authority to exclude and detain aliens. Indeed, the Attorney General's discretionary parole authority may be exercised only with respect to an "alien applying for admission to the United States" (8 U.S.C. 1182(d)(5)(A)) and cannot realistically be viewed in isolation from the authority to exclude and detain, of which it is but an outgrowth.[17]

Petitioners, however, seize upon the established rule that parole from detention pending a determination of admissibility does not effect an entry into the United States in contemplation of law, see *Leng May Ma*, 357 U.S. at 190, and argue that judicial review of parole decisions on extrastatutory grounds accordingly would not "interfere with the power of Congress and the President to determine admission questions" (Br. 32). While we agree with petitioners' predicate, it does not support their sophistic conclusion. Of course granting parole would not deprive the Attorney General of the legal authority to revoke parole. But the cases that hold that a paroled alien acquires no legal rights respecting admission above and beyond one who stands (in fact as well as in law) outside the United States plainly do not suggest that excludable aliens have extrastatutory rights to parole.

[17] All of the petitioners are, by definition of their certified class, excludable aliens "who are applying for entry into the United States" (J.A. 176). We note that the only basis for admission suggested by petitioners during the course of this litigation is their desire to be granted asylum in this country. If the Attorney General determines that an alien is a "refugee" within the meaning of 8 U.S.C. 1101(a)(42)(A), the alien may be granted asylum, released from custody and allowed to be physically at large within the United States. An application for asylum will be treated as a request for withholding of exclusion under 8 U.S.C. 1253(h) and will cause the exclusion proceeding to be adjourned. See 8 C.F.R. 208.3(b); 208.10(b). Indeed, an exclusion proceeding that has already been concluded may be reopened on the basis of a request for asylum. 8 C.F.R. 208.11.

More to the point, the practical effect of a de facto admission through parole is not appreciably different from that of a formal legal admission. As the court of appeals observed (J.A. 316), parole of an alien into the United States "permit[s] the physical entry of the alien into the midst of our society and implicates many of the same considerations—such as employment and national security concerns—that justify restrictions on admission."[18] And as the court of appeals further noted, although a grant of parole is "subject to certain restrictions and is theoretically of a short-term character," the "reality can be quite different," for "an alien with a skilled attorney can

[18] We are somewhat mystified by petitioners' unexplained assertion that "[t]he word 'parole' has two entirely separate meanings in immigration law," suggesting that this case involves only "temporary parole" as distinguished from some other kind of non-temporary parole (Br. 6 n.10; see also *id.* at 43 n.51). It may be that petitioners allude only to the duration of the parole involved. Alternatively petitioners may employ the label "temporary parole" to distinguish parole from the admission of refugees who are, but for their refugee status, ineligible for admission. See page 36 note 17, *supra*. Admission of aliens determined to be eligible for asylum is now governed by 8 U.S.C. 1157-1159 and is not properly regarded as parole. Although it appears that the Attorney General's parole authority was, prior to 1980, employed as an additional means of accommodating refugees (see *INS* v. *Stevic*, No. 82-973 (June 5, 1984), slip op. 7), Section 203(f) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107, added the provisions now found in 8 U.S.C. 1182(d)(5)(B) that strictly limit the use of parole as a substitute for admission of an alien as a refugee.

delay the exclusion process for years" (J.A. 315-316 & n.20). More telling still, paroled "aliens who choose to abscond face only a minimal risk of apprehension" (*id.* at 316 n.20). Thus, the availability of parole may have a corrosive effect on the government's plenary authority to exclude aliens (*id.* at 315 n.18). This effect is especially debilitating of the government's lawful authority because allowance of parole may act as an inducement to persons ineligible for admission to seek to enter the United States. In fact, both the district court and the Eleventh Circuit have concluded that, prior to the 1981 shift in the government's parole and detention policy, precisely this phenomenon was operating with respect to Haitians seeking entry to this country (J.A. 119 n.17, quoting *Haitian Refugee Center, Inc.* v. *Smith*, 676 F.2d 1023, 1029 n.11 (1982)).[19]

[19] Petitioners repeatedly assert (Br. 17-18, 22, 29-30) that the government had no legitimate basis for concern that their parole would adversely affect national security or that they were likely to abscond if released on parole. Petitioners misread the record in this regard and, in any event, have missed the critical point. It is true that the INS had not identified any reason to believe that Haitian aliens were more likely to abscond than other excludable aliens. But there is no doubt that the government did have reason to fear that paroled Haitians, like other paroled aliens, might abscond and become difficult or impossible to locate. For instance, paroled Haitians frequently failed to appear as required at INS hearings (4/1/82 Tr. 2398-2399). See also GAO Rep. 15 & n.4 (Haitian aliens failed to appear at more than 300 of the 500 cases scheduled for hearing between March 5, and May 28, 1981; 2,429 out of 3,311 appearances missed between February 18, and July 16, 1982).

Petitioners also misapprehend the nature of the national security concern posed by parole of large numbers of unadmitted aliens. The point is not that any one individual was a security risk. Rather, it was the specter of loss of effective control of the Nation's borders created by the accumulation of masses of unadmitted aliens presumptively ineligible for admission, coupled with the former policy of routine parole, that created an institutional threat to national well-being. As the court of appeals observed (J.A. 314 n.16), "[a]ny broad conception of 'national security' must surely include the ability to regulate entry into a country * * *."

Accordingly, it is wholly unrealistic to suggest that the exercise of the Attorney General's parole authority may be subjected to extrastatutory constraints, inapplicable to the admission process itself, without severely undermining the government's plenary authority to control entry of aliens. As Judge Learned Hand explained in *Mezei*, anticipating this Court's ruling, temporary parole "does give [an excludable alien] a privilege of entry" that, while "hedged about in various ways," enables him to "mingle with the mass of citizens." *United States ex rel. Mezei* v. *Shaughnessy*, 195 F.2d 964, 970-971 (2d Cir. 1952) (dissenting opinion). In short, if the entry doctrine were inapplicable to parole determinations, as petitioners submit, parole litigation would assuredly have the impermissible effect of displacing the properly "political decisions as to whom we will permit, even temporarily, to join our society" (Br. 35.)[20] This is especially so where, as here, the President and Attorney General decided to implement a new restrictive parole policy precisely because they had determined that such a policy was necessary to maintain the efficacy of the Nation's sovereign authority to exclude aliens. See pages 3-5, *supra*.[21]

b. In any event, this Court has expressly recognized that "detention, or temporary confinement" is "part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens" (*Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896)). "Proceedings

[20] Denial of parole is readily distinguishable from the hypothetical measures that troubled Justice Jackson in *Mezei*—"eject[ing an alien] bodily into the sea or [setting] him adrift in a rowboat" (345 U.S. at 226) (dissenting opinion). In contrast to these unlikely hypotheticals, simple confinement of an unadmitted alien pending determination of admissibility is "ancillary to exclusion" (*id.* at 227).

[21] As the court of appeals pointedly observed (J.A. 322-323), if an excludable alien could challenge a decision of the political branches to deny him parole, a hostile foreign leader could manipulate our immigration system in a manner that "would ultimately result in our losing control over our borders."

to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation" (*ibid.*). See also *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings"); *Palma v. Verdeyen*, 676 F.2d 100, 104 (4th Cir. 1982).

Moreover, as the court of appeals observed (J.A. 311-313), this Court's decision in *Mezei* is directly on point. There, the Court held that the Fifth Amendment afforded an excludable alien no right to be allowed temporary physical entry into this country. The issue presented was "whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad" (345 U.S. at 207). Because Mezei did not challenge the government's power to exclude him but sought only release pending implementation of the exclusion order, this Court's decision, as the court of appeals recognized, "did not concern admission or exclusion *per se*, but the rights of an alien when challenging his continued detention pending the enforcement of an exclusion order that had been entered against him" (J.A. 312). It follows, then, that the holding of *Mezei* denying extrastatutory rights to excludable aliens is not restricted to frontal challenges to denial of the right to enter. Rather, under *Mezei* the entry doctrine also forecloses efforts to litigate the propriety of denial of interim parole.

2. Petitioners also argue (Br. 35) that even if parole determinations are conceded in the abstract to be sufficiently related to the political branches' unreviewable authority over admission itself, extrastatutory judicial review of the former may not be foreclosed under the entry

doctrine unless it is demonstrated that the authority to exercise parole discretion in a *discriminatory* manner is equally intimately bound up with the unreviewable political concerns entrusted exclusively to the Legislative and Executive Branches. Petitioners' argument is fallacious: it would effectively circumvent the entry doctrine by requiring any nationality-based distinctions among classes of aliens employed by the Attorney General in exercising his parole authority to pass judicial scrutiny in order to demonstrate that no such scrutiny is warranted.

Furthermore, petitioners' formulation is inconsistent with *Mezei* itself, which teaches that the entry doctrine extends to collateral claims as well as foreclosing any claims of a substantive right to enter. Petitioners press an equal protection claim that they portray as analytically distinct from any assertion of a substantive right to parole. Granting parole to class members, they suggest, would merely be a remedy for a kind of collateral wrong they have allegedly suffered: discrimination in the administration of parole. But Mezei, too, arguably had a discrete constitutional claim (sounding in procedural due process) that could have been distinguished analytically from any assertion of a substantive right to parole—*i.e.*, that he had been excluded *without a hearing* in violation of due process and accordingly should be judicially paroled (345 U.S. at 207). Nevertheless, in extending the entry doctrine to bar even Mezei's claim for parole, the Court in *Mezei* did not deem it necessary to determine that the reasons for denying parole *without a hearing* were sufficiently compelling and sufficiently related to sovereign prerogatives to preclude judicial review. Compare 345 U.S. at 217-218 (Black, J., dissenting); *id.* at 224-228 & n.9 (Jackson, J., dissenting). Instead, the Court simply remarked that because Mezei was an "entrant alien," the "Attorney General [could] lawfully exclude [him] without a hearing as authorized by emergency regulations promulgated pursuant to the Passport Act." (*id.* at 214-215).

Thus *Mezei* forecloses petitioners' contention that the government must justify the withholding of extrastatutory judicial review of the particular claim that an alien seeks to raise in challenging the denial of parole. Indeed, as Justice Jackson's dissent makes clear (345 U.S. at 224-228), because Mezei could have been afforded (at the government's election) a hearing, rather than parole, as a remedy, his claim was not inextricably bound up with the power to exclude; petitioners' due process claim, by contrast, effectively asserts a substantive right of entry. Justice Jackson, of course, agreed that unadmitted aliens have no such right. *Id.* at 222-224.

The most compelling reason for foregoing the extra inquiry proposed by petitioners lies in the nature of the remedy they seek based on their claim of unlawful discrimination: release from detention. Notwithstanding the arguably discrete character of the denial of procedural rights challenged in *Mezei*, the fact remained that to admit Mezei as a sanction for that denial would have "nullifie[d] the very purpose of the exclusion proceeding," impermissibly negating the decision of the political branches that parole should not be available to Mezei. 345 U.S. at 216. The situation regarding petitioners' claim is not essentially different. Notwithstanding the claimed discrimination, extension of parole to petitioners as a remedy is impermissible because the courts simply lack authority to admit excludable aliens to the United States on terms inconsistent with the statutory delegation of authority to the Attorney General. Cf. *INS* v. *Miranda*, 459 U.S. 14, 19 (1982); *INS* v. *Hibi*, 414 U.S. 5 (1973).[22] Under the entry doctrine, the bar to judicial review importing extrastatutory criteria lies not in the

[22] Contrary to petitioners' suggestion (Br. 24 n.28), even the strong policy against discrimination reflected in many aspects of our laws does not invariably override powerful countervailing policies that would limit the availability of remedies to persons claiming to have suffered unconstitutional discrimination. See, *e.g.*, *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983).

nature of the right asserted, but in the unavailability of the remedy requested.[23]

3. Petitioners attempt (Br. 40-43) to distinguish *Mezei* on a variety of narrow factual grounds. These efforts are unpersuasive.

a. Petitioners contend (Br. 40-43) that this case is distinguishable from *Mezei* because there the excludable alien sought parole after he was already subject to a final order of exclusion, whereas here the excludable Haitian aliens who challenge their detention have not yet been issued final exclusion orders and are being detained pending a determination of admissibility. But petitioners do not offer any reason why this distinction should alter the outcome. As we have already explained (pages 35-40), the power to detain unadmitted aliens pending a determination of admissibility is a necessary adjunct of the plenary power to exclude those who will ultimately be found inadmissible under the applicable statutory standards. If anything, the factual comparison between this case and *Mezei* suggests that Mezei's claim was more compelling than that of petitioners. Mezei was already under a permanent exclusion order and was being detained preparatory to deportation, but no other country was willing to admit him. The detention that he challenged thus was indefinite in duration. 345 U.S. at 208-209. By contrast, petitioners are merely being detained pending the completion of their exclusion hearings—and resolution of

[23] The inappropriateness of judicially-mandated parole as a remedy for discrimination in the exercise of parole authority is especially clear on the record of the present case. Petitioners' claim in this Court is in substantial measure that field-level INS personnel administered a neutral national policy intended sharply to restrict the availability of parole to alien entrants of all nationalities in an unauthorizedly underinclusive fashion, with the result that Haitians were differentially affected. See pages 18-19, *supra*. That some excludable aliens may have been improperly allowed parole does not justify refusal to enforce against others the deliberately established Executive policy restricting parole. See *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 9-10.

asylum claims that they have themselves made—and there will be no impediment to their return to their country of origin upon completion of those proceedings in those instances where a final order of exclusion is entered. On the other hand, any class members who demonstrate admissibility will in due course be admitted. No legally cognizable hardship arises from the requirement that petitioners be denied entry to the United States until their right thereto has been properly established in appropriate proceedings.

b. Petitioners also seek (Br. 43) to distinguish *Mezei* on the ground that no statutory authority then existed for granting parole to an excludable alien (see 345 U.S. at 216 nn.14-15), whereas the Attorney General has now been vested with parole authority under 8 U.S.C. 1182 (d) (5) (A). Again, this is a distinction without a difference. Petitioners do not explain how the existence of statutory parole authority could affect the constitutional analysis embodied in *Mezei*. To be sure, the Court in *Mezei* commented that the then newly enacted 8 U.S.C. 1182(d)(5) was "not now" before it. 345 U.S. at 216 n.14. But this comment merely explained the Court's statement that statutory authority for Mezei's parole was lacking (*id.* at 216) and provides context for its holding that Mezei's detention did not deprive him of "any *statutory* or constitutional right" (*id.* at 215; emphasis added). The most that can be said in this respect is that *Mezei* leaves open the question whether the Attorney General's exercise of his statutory parole discretion may be reviewed under some nonconstitutional abuse of discretion standard or for consistency with the applicable statutory policy.[24] The availability of parole pursuant to statute plainly affords no reason to question the rule that Congress has complete authority to establish procedures and standards governing entry and parole of aliens into the United States.

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[24] Of course, the court below held that such nonconstitutional review is available. See pages 12-14, *supra*.

c. Petitioners also appear to suggest (Br. 42 & n.49, 46) that *Mezei* is distinguishable as a Cold War relic involving national security concerns and that the entry doctrine is similarly limited in reach. This Court rejected a virtually identical contention in *Fiallo* v. *Bell*, 430 U.S. at 796. There the plaintiffs sought to distinguish the Court's "prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of aliens that were 'specifically and clearly perceived to pose a grave threat to the national security' * * * 'or to the general welfare of this country.'" The Court pointedly disagreed in terms that foreclose petitioners' arguments here (430 U.S. at 796):

> We find no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue.

In any event, as we have discussed (pages 37-39), this case, too, implicates the authority of the government to act regarding matters vital to the general welfare of the country and its security. The Court has long recognized that the authority of the political branches to control our borders and determine who shall enter into our midst is a fundamental attribute of sovereignty and that the existence of this authority does not depend on any judicial appraisal of the gravity of the situation confronting the Nation. The Court explained in the *Chinese Exclusion Case*, 130 U.S. at 606, that the exclusion power of the political branches is appropriately addressed to "aggression and encroachment" from abroad, whether in the form of "the foreign nation acting in its national character," as in the event of war, or simply in the form of "its people crowding in upon us." The Court added that "the same authority which adjudges the necessity [of exercise of exclusion authority] in one case must also determine it in the other. *In both cases its determination is conclusive upon the judiciary*" (*ibid.*; emphasis added). See also *Harisiades* v. *Shaughnessy*, 342 U.S. at 588-590.

d. Ultimately, perhaps despairing of distinguishing this Court's pertinent decisions, petitioners ask the Court to overrule these authorities. (Br. 23, 40, 44-46). In support of this venturesome request petitioners intimate (Br. 45) that "recent developments have eviscerated *Mezei's* rationale."[25] But as we have demonstrated (pages 25-29), *Mezei* marks no departure from the consistent thread of this Court's teachings regarding the protections afforded to unadmitted aliens. Moreover, the "assumptions" that in petitioners' view underlie *Mezei* and that are further said no longer to be valid in fact either retain undiminished vitality or else never formed any part of the entry doctrine.

Contrary to petitioners' assertions, the entry doctrine does not rest on the simplistic notion that any class of governmental action is exempt from otherwise applicable constitutional restraints, nor on any doctrine that excludable aliens are not persons in the eyes of the law, nor on any doctrine respecting the geographical reach of the Constitution's provisions. Instead, the rule rests firmly on principles of sovereignty, the doctrine of separation of powers, and the conclusion that the only content that may be assigned to the concept of due process in the context of regulating the entrance of aliens into this Nation is that which Congress provides. Thus, as we have explained (pages 25-35), the unreviewability under the Fifth Amendment of exclusion decisions affecting only the rights of unadmitted aliens remains the law today.

Petitioners' argument, at bottom, asks the Court simply to discard its past precedents in favor of a new doc-

[25] Petitioners also seek to discredit *Mezei* by asserting, incorrectly, that a plurality of the Court subsequently "strongly suggested disapproval of *Mezei's* extreme position when it stated that the decision created an 'intolerable situation'" (Br. 45, citing *Trop* v. *Dulles*, 356 U.S. 86, 102 n.36 (1958)). Examination of that plurality opinion, however, reveals that the reference to an "intolerable situation" was merely intended to describe the unenviable position in which Mezei found himself when he was determined to be excludable but remained in indefinite detention because no other country would admit him.

trine petitioners believe to comport better with desirable policy. This the Court has refused to do. Rather, its decisions "confirm th[e] view" that "an alien seeking initial admission to the United States * * * has no constitutional rights regarding his application" (*Landon* v. *Plasencia*, 459 U.S. at 32). Indeed, the Court has at least twice in recent times declined to reconsider the doctrines on which we rely. *Fiallo* v. *Bell*, 430 U.S. at 792-793 & n.4; *Kleindienst* v. *Mandel*, 408 U.S. at 765-767. On each occasion the Court adopted Justice Frankfurter's exposition of the reasons why stare decisis applies with unique force in this context. Writing on a closely related issue in *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954), Justice Frankfurter stated that "the slate is not clean. As to the extent of the power of Congress under review there is not merely 'a page of history,' but a whole volume" (*ibid.*; citation omitted). Justice Frankfurter stated that the doctrine of exclusive political control over matters involving entry of aliens "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government," and added: "We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors" (*ibid.*). Petitioners have failed to offer a sufficient reason why the Court should suddenly abandon this well-settled precept of immigration law.[26]

[26] Petitioners' reliance on Justice Jackson's dissent in *Mezei*, said to articulate views "more consonant with modern constitutional doctrine" (Pet. Br. 46), is in any event factually unwarranted. The key to Justice Jackson's disapproval of the result in *Mezei* was that there the excludable alien was, because of the impossibility of effectuating deportation, effectively detained indefinitely. 345 U.S. at 227. Here, unlike *Mezei*, detention is not "indefinite" or an "end in itself"; rather it is "ancillary to exclusion," and "can be justified as a step in the process of turning [petitioners] back to the country whence [they] came" (if they are ultimately denied admission). *Ibid.* Moreover, petitioners, unlike Mezei, cannot conceivably be said to have been "entrapped into leaving the other shore by reliance on a visa which the Attorney General refuses to honor" (*ibid.*). See also page 39 note 20, and page 42, *supra*.

C. Because Nationality Distinctions Are Inherently Permissible In The Formulation And Application Of The Immigration Laws, Restriction Of Judicial Review Under The Entry Doctrine Is Especially Appropriate Here

1. In this case petitioners seek to press an equal protection claim; they assert (Br. 30, 35, 42-43) that the gravamen of their claim takes it outside the reach of the entry doctrine. We have already explained (Br. 40-43) why the nature of the claim presented here provides no basis for distinguishing this Court's precedents and cannot serve to reconcile the relief demanded—judicially directed release of unadmitted aliens into the United States—with the plenary authority of Congress and the Executive to determine whether an alien should be allowed to enter this country. But an equally compelling reason for rejecting petitioners' contentions lies in the unique footing upon which nationality distinctions applicable to immigration and naturalization matters stand. Significantly, even outside the present context—admission and de facto admission decisions affecting only excludable aliens, where notions of sovereignty and separation of powers dictate maximum judicial deference—such nationality distinctions are not subject to the standards that would ordinarily govern scrutiny of nationality distinctions under the Fourteenth Amendment Equal Protection Clause.

a. To be sure, this Court has held that the Fifth Amendment's Due Process Clause includes an equal protection component. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). In some contexts, this component requires an analysis similar to that conducted in cases involving the Equal Protection Clause of the Fourteenth Amendment. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976). But the Court has recognized that

> the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.

Hampton v. *Mow Sun Wong*, 426 U.S. at 100 (footnote omitted). Specifically, "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Mathews* v. *Diaz*, 426 U.S. 67, 86-87 (1976). Indeed, in the immigration context, the government "regularly makes rules that would be unacceptable if applied to citizens" (*id.* at 80). Among these are the rules governing exclusion of aliens. *Ibid.*

Even aliens who have been admitted to the United States do not enjoy protection against official federal "discrimination within the class of aliens" comparable to that provided by the Fourteenth Amendment (*Diaz*, 426 U.S. at 80 (emphasis omitted)). Because decisions respecting relations between the United States and aliens "may implicate our relations with foreign powers," and because "a wide variety of classifications must be defined in light of changing political and economic circumstances," the Court explained in *Diaz* that a "rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution" (426 U.S. at 81). These matters, the Court acknowledged, are "frequently of a character more appropriate to either the Legislative or the Executive than to the Judiciary." *Ibid.*

In *Diaz*, the Court upheld the restriction of Medicare eligibility to aliens who had been admitted for permanent residence and had resided in the United States for at least five years. The Court determined that neither requirement was "wholly irrational." 426 U.S. at 83. *Diaz* was followed by *Fiallo* v. *Bell*, *supra*, which rejected an equal protection attack on sex and illegitimacy classifications in the immigration law. The Court found that the classifications were "facially legitimate and bona fide," declining the plaintiffs' invitation to weigh the policy justifications for the classifications or to consider

the availability of alternatives (430 U.S. at 794, 798-799). In short, classifications of this kind—presumptively suspect in other contexts—are permissible as to aliens, even outside the admission context, so long as they are not "wholly irrational" (*Diaz*, 426 U.S. at 83).

b. Because the subject matter of immigration law necessarily implicates the relationship of the United States with aliens and foreign countries, nationality-based classifications are precisely the kind of classifications respecting aliens that are entirely legitimate. Indeed, it is difficult to imagine that any sovereign nation would disable itself from taking nationality into account in dealing with aliens or in promulgating its immigration code.

In the immigration field, Congress has repeatedly drawn distinctions on the basis of national origin. For example, Congress historically imposed a nationality-based quota system on the issuance of immigrant visas. Prior to 1965, each foreign country had a specified immigration quota. Compare 8 U.S.C. (1964 ed.) 1151 (nationality-based quota system) with 8 U.S.C. 1151 (worldwide numerical limitations). And it could not seriously be suggested that the immigration quota system was unlawful, or even that the courts had any authority to assess the basis for these classifications. The Attorney General also has long drawn distinctions among aliens on the basis of nationality, and Congress has not disturbed this administrative practice. See, *e.g.*, *Saxbe* v. *Bustos*, 419 U.S. 65 (1974).[27] The courts have consistently recognized the validity of these classifications.[28]

[27] See also 8 C.F.R. 101.1 (presumption of lawful admission for certain national groups); 8 C.F.R. 212.1 (documentary requirements for nonimmigrants of particular nationalities); 8 C.F.R. 231 (arrival-departure manifests for passengers from particular countries); 8 C.F.R. 242.2(e) (nationals of specified countries entitled to special privilege of communication with diplomatic officers); 8 C.F.R. 252.1 (relaxation of inspection requirements for certain British and Canadian crewmen).

[28] See, *e.g.*, *Malek-Marzban* v. *INS*, 653 F.2d 113 (4th Cir. 1981) (amendment to rule on voluntary departure to reduce the time allowed for Iranian nationals); *Yassini* v. *Crosland*, 618 F.2d 1356 (9th Cir. 1980) (INS directive revoking deferred departure dates for Iranian nationals); *Narenji* v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 947 (1980) (regulation requiring Iranian students to report on their current status); *Noel* v. *Chapman*, 508 F.2d 1023, 1028 (2d Cir.), cert. denied, 423 U.S. 824 (1975) (alien relatives of resident aliens from Eastern Hemisphere given preference not applicable to alien relatives of Western Hemisphere resident aliens); *Alvarez* v. *District Director, INS*, 539 F.2d 1220 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977) (special status for commuter aliens only from Mexico and Canada); *Dunn* v. *INS*, 499 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1106 (1975) (one type of discretionary relief from deportation inapplicable to aliens from Western Hemisphere).

Nationality-based classifications among aliens in the framing and implementation of the immigration laws typically arise from deliberate decisions of our Nation's political branches made in response to the actions of other nations that affect our vital interests or otherwise engage our sovereign prerogatives. For instance, the Court in *Diaz* observed that the plaintiffs, Cuban parolees, were "but one of several categories of aliens who have been admitted in order to make a humane response to a natural catastrophe or an international political situation" under a legal regime that permits "flexibility in policy choices" (426 U.S. at 81). This latitude must exist whether the actions determined to be necessary by competent political authority enlarge or restrict the privileges of aliens. It can scarcely be doubted that the various administrative initiatives taken with respect to Iranian nationals in response to the occupation of this Nation's embassy in Teheran (see pages 50-51 note 28, *supra*) served the most compelling national interests. Any rule restricting the use of nationality classifications might inhibit the ability of the Executive to exercise its discretion under the immigration laws to respond effectively to external factors such as that crisis, or Cuba's effort to foist its undesirable citizens upon this country at the time of the Mariel "boatlift," or Soviet actions that create streams of refugees (in Poland, Hungary, Czecho-

slovakia or Afghanistan), or the consequences of our own international engagements (*e.g.*, the flood of refugees from Vietnam after the fall of Saigon).[29]

c. It is accordingly clear beyond peradventure that Congress and the Executive have exceedingly broad authority to apply nationality classifications under the immigration laws.[30] Thus, even if the Court were prepared to reassess the doctrine of the entry cases, it would be particularly inappropriate to do so in the context of a challenge to the political branches' authority to recognize

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[29] As the court of appeals observed (J.A. 329 & n.30), the decisions of this Court make clear that, at least absent contrary statutory language (see, *e.g.*, 8 U.S.C. 1152(a), prohibiting—with stated exceptions—specified forms of discrimination in issuance of immigrant visas), authority to draw nationality-based classifications generally is shared by Congress and the Executive. See *Fiallo*, 430 U.S. at 796; *Diaz*, 426 U.S. at 81-82; see also *Narenji* v. *Civiletti*, 617 F.2d at 747. Here, of course, Congress has explicitly delegated to the Attorney General broad discretion to make determinations as to the availability of parole. 8 U.S.C. 1182(d)(5)(A). This grant of discretion necessarily includes the authority to draw nationality distinctions in the exercise of parole authority "for reasons deemed strictly in the public interest" (*ibid.*). See *Diaz*, 426 U.S. at 81; see also 8 U.S.C. 1182(f) (authorizing the President to suspend or condition the entry of "any aliens or any class of aliens" whose entry is deemed "detrimental to the interests of the United States"). Petitioners appear (Br. 36-39 & n.45) to concede the authority of the President and the Attorney General to draw such distinctions.

[30] Contrary to the assumption that pervades petitioners' brief (see, *e.g.*, pages i, 3, 22, 24 & n.28, etc.), this case does not present any question as to the constitutional restraints that may apply to *racial* classifications in the admission of aliens. As the court of appeals panel observed (J.A. 243 n.29), petitioners' evidence was in fact focused on nationality discrimination against Haitians. Moreover, whatever else may be said about the factual record in this case, it is clear that none of the evidence said to support petitioners' discrimination claim—evidence that is rather selectively canvassed by petitioners in this Court (Br. 10-18)—contains any suggestion that Haitians were classified for disparate treatment because they are black.

nationality classifications among aliens seeking to enter the United States. Petitioners evidently contend (Br. 36-39) that judicial review of nationality classifications—even in this wholly "political" context—should be governed by the standards articulated in *Fiallo* and *Diaz* (see pages 49-50, *supra*), rather than by the doctrine of the entry cases. The established rule regarding unadmitted aliens is, however, most faithful to separation of powers concerns and is supported by compelling policy considerations.[31]

As the examples we have given (pages 51-52, *supra*) illustrate, the nationality classifications that are drawn from time to time in the Attorney General's exercise of parole discretion are precisely the kind of classifications that "must be defined in the light of changing political and economic circumstances" and that are "more appropriate to either the Legislature or the Executive than to the Judiciary" (*Diaz*, 426 U.S. at 81). Extrastatutory review of the exercise of the Attorney General's parole discretion, even under a deferential standard, would undesirably "inhibit the flexibility of the political branches of government to respond to changing world conditions" (*ibid.*). The courts simply are not possessed of the requisite expertise or familiarity with international relations problems properly to evaluate the policy determinations of the political branches respecting nationality classifica-

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[31] We note that any substantive difference between the two standards may be more apparent than real. *Fiallo* makes clear that the courts are in no event to become embroiled in judging the merits of the policy decisions of the Executive and Congress that classify aliens. 430 U.S. at 798-799. Such matters remain " 'wholly outside the power of this Court to control' " (*id.* at 799; citation omitted). Indeed, the Court has not required that the author of the classification even articulate its justification. *Ibid.* ("Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, *perhaps* because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations" (emphasis added)). It is enough that the classification be applied and its rationality discernible.

tions that may be employed in the administration of parole authority. See *Narenji* v. *Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979), cert. denied, 446 U.S. 947 (1980), citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936):

> [I]t is not the business of the courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials.

In the final analysis there simply are no "judicially discoverable and manageable standards" for assessing the justifications for such nationality classifications (*Baker* v. *Carr*, 369 U.S. 186, 217 (1962)).

Any effort to inquire into the justifications for nationality classifications respecting unadmitted aliens would ultimately be sterile and burdensome to both the courts and the political branches. Such an inquiry would be sterile because of the sheer improbability of discovering an instance in which a wholly irrational nationality classification had been imposed. And it would be burdensome because of the fruitless imposition upon the courts, and because the opportunity for litigation itself would threaten to divert the energies and influence the conduct of responsible officials to whom discretionary authority to admit aliens is committed. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 751-753 (1982). Finally, in many instances, judicial review of the justifications for nationality classifications would intrude upon sensitive or confidential matters that are the subject of intergovernmental communications. See *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 2.

In sum, the ability to establish needed classifications on short notice—without pausing to satisfy the courts of their rationality or necessity—may be an essential

weapon in the President's arsenal in dealing with an international crisis. There is simply no warrant for judicial oversight that may potentially be embarrassing to the United States' relations with other nations or detrimental to the Nation's ability to deal effectively in the international arena.

2. Assuming arguendo that petitioners' opportunity for parole was, contrary to the testimony of responsible high government officials, adversely affected by a nationality-based classification, there is no reason to doubt that such a classification would, given the circumstances that existed in 1981, meet any standard of rationality that might be applied to judge it. As we have explained (pages 2-5), in early 1981 this Nation was confronted with a serious and widespread breakdown in immigration enforcement. The Attorney General, acting on the counsel of a cabinet-level task force, determined that in order to restore credibility and efficacy to our exclusion procedures it was necessary to adopt a new policy—actually, to return to the pre-1954 policy—of detaining unadmitted aliens stopped at the border who are unable to establish a prima facie claim for admission.

That policy was, as petitioners now concede, intended to be applied on a wholly non-discriminatory basis. At the same time, however, in putting the new policy into effect, it would have been entirely rational to take special administrative measures to assure efficient implementation in regard to Haitians. As the district court found, a prime example of the breakdown of prior parole policy was the presence in Florida of about 35,000 excludable Haitian aliens, whose numbers were daily being augmented by a "continuous flow of Haitians into South Florida" (J.A. 118-119, 130). The situation in South Florida was further aggravated by the arrival in that region in the spring of 1980 of 125,000 excludable Cuban aliens as part of the Mariel "boatlift." The federal government assigned a special "Cuban/Haitian" entrant status to the Mariel Cubans and to the Haitians who had

arrived by October 10, 1980, and it aided in efforts to resettle them (J.A. 120). But, as the district court explained, "[t]he local communities were left with the task of providing jobs, housing, health care and food for the approximately 150,000 new residents of South Florida. This burden taxed local resources to their limits and continues to do so." *Ibid.*

In the circumstances, it would have been wholly rational to take special steps vigorously to implement the new detention policy with respect to Haitian aliens who continued to arrive in South Florida in the second half of 1981.[32] This is especially so because of the certainty that adherence to the old policy of uncritically granting parole would have continued to encourage new waves of arrivals, and would have led, in practice, to the unregulated presence of illegal aliens within the United States. See pages 3, 37-39, *supra.* It also would have been reasonable for decision makers to conclude that the new direction of federal policy to discourage illegal entry would be communicated with particular efficacy to persons of a given nationality contemplating unauthorized entry to the United States as that policy was applied to their countrymen who had already made the attempt. Devoting special administrative attention to the continuing influx of Haitian aliens thus would have been entirely permissible, if that did indeed occur.[33]

[32] Even the court of appeals panel acknowledged that "the decade-long influx of undocumented immigrants from the Carribean basin to south Florida presaged the end of the Administration's permissive attitude toward illegal immigration" and that the Mariel "boatlift" had the "greatest impact" in catalyzing this change (J.A. 198).

[33] As we have explained (pages 18-19 & note 11), petitioners have in this Court shifted or at least refined their claim so that they now attribute any discrimination solely to low-level INS enforcement officials. This new emphasis cannot affect the resolution of the constitutional question they present in this case. The authority to parole unadmitted aliens has been committed by Congress to the Attorney General. It is fundamental that even when exercised by his delegates, that authority is exercised in the name of the Attorney General; their actions are his in contemplation of law. See 8 U.S.C. 1103(a). Any lack of conformity by the Attorney General's subordinates to his policies has no bearing on the question whether parole of an unadmitted alien may be ordered because of a constitutional violation. On the other hand, as the court of appeals held, a challenge to a denial of parole on abuse of discretion grounds may be based on disobedience of official policy by subordinate decision makers.

3. Petitioners portray this case in a quite different light, asserting (Br. 3) that "the record in this case demonstrates, without contradiction, [that] INS officials have discriminated invidiously against black Haitian refugees in deciding to incarcerate them initially, and in prolonging their incarceration without parole pending a determination of their asylum claims." As we have explained in more detail in our Brief in Opposition (pages 17-19 & n.13), however, petitioners have gravely misrepresented the posture of this case in this regard. To the extent that petitioners rely on the opinion of the court of appeals panel, their reliance is wholly impermissible, because the en banc court of appeals vacated the panel decision. See page 12, *supra.*[34] The opinion of the en banc court does not disturb the findings of the district court, which include a determination that no unconstitutional discrimination occurred. See pages 7-9, *supra.*

In any event, even if the decision of the panel had not been vacated, it would be a weak reed to support petitioners' factual assertions. There is no occasion here to consider in detail the flaws in the panel's determination that petitioners had proven nationality discrimination. But it is plain at the threshold that the panel's entire analysis proceeds on the erroneous assumption that a

[34] The en banc court's statement (J.A. 295) that "the facts of this case have been extensively set forth in the opinions of the panel and the district court" plainly does not suggest that the en banc court adopted the panel's rulings on the discrimination issue. Petitioners' assertion (Br. 3 n.2) that the en banc court "implicitly concurred" in the panel's "findings" is simply fantastic.

showing that a nationality classification was applied would be sufficient to establish impermissible discrimination. See pages 48-52, *supra*. So far as the panel was concerned, if petitioners made out a prima facie case of nationality classification, it was open to the government only to show that no nationality classification was intended (see J.A. 243-244).[35]

Moreover, the panel treated the case as though it presented a garden variety claim of invidious discrimination in a domestic context, relying upon cases concerning state action decided under the Fourteenth Amendment, in disregard of this Court's decisions establishing a quite different standard of review even for claims of discrimination against resident aliens under the Fifth Amendment. See pages 48-50, *supra*; see also *Bertrand* v. *Sava*, 684 F.2d at 218 n.17. Indeed, the panel relied heavily and impermissibly on Fourteenth Amendment decisions regarding jury selection challenges (J.A. 243-244). This Court's decisions, of course, make clear that statistical demonstrations of disparate impact—which were the backbone of petitioners' evidentiary submission—go much further toward establishing proof of discriminatory purpose in the jury selection context than they do in other cases. See *Castaneda* v. *Partida*, 430 U.S. 482, 493-494 (1977); *Washington* v. *Davis*, 426 U.S. 229, 241 (1976); see also *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). The panel also acknowledged relying upon the standards,

[35] Elsewhere in its opinion the panel stated cryptically that "this case never reached the examination of a rational reason for the discriminatory treatment, because [petitioners'] prima facie case was unrebutted" (J.A. 216 n.11). The panel added (*ibid.*) that "[t]he effect of the line-drawing suggested by some [of the evidence] * * * [was] to deter with one narrowly formulated rule the immigration of aliens we do not wish to have enter, while treating quite differently other classes of equally 'illegal' immigrants." As we have explained above (pages 55-56), such a classification, if it indeed occurred, would have been at the very least presumptively permissible.

burdens and methods of proof applied in cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (J.A. 244 & n.30); such reliance was erroneous. *Washington* v. *Davis*, 426 U.S. at 238. Finally, the panel displayed little of the required deference to the district court's findings of fact. See *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). Accordingly, even if it were relevant, this case does not come before the Court impressed with any credible determination that petitioners' claims have factual merit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

BARBARA L. HERWIG
MICHAEL JAY SINGER
Attorneys

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